LAW AND CONTEMPORARY PROBLEMS

URBAN RENEWAL
Part II

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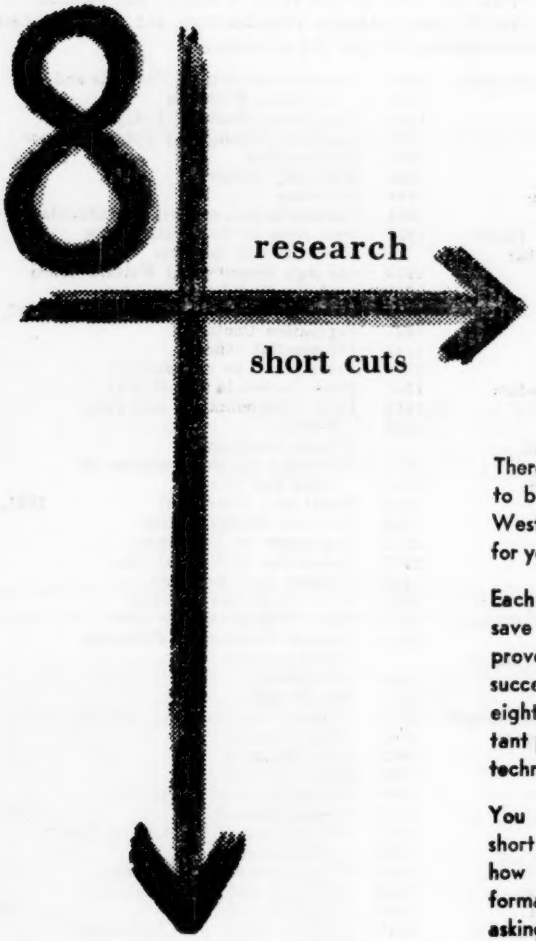

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LAW AND CONTEMPORARY PROBLEMS

VOLUME 26 WINTER, 1961 NUMBER 1

FOREWORD

The harassed city officials charged with planning and execution of an urban renewal project seldom have time to meditate on what they have wrought (or even to read a *Law and Contemporary Problems* symposium). Yet, in the rare moments such an official may have for reflection, a succession of thoughts and questions about urban renewal will rush into his mind. He may begin by pondering: Whence came this urban renewal program? He is aware of the tortuous path followed in the late 1940's by urban renewal legislation,[1] and he knows the basic provisions of the Housing Acts of 1949,[2] 1954,[3] and 1959.[4] With respect to the history of urban renewal in his own state, he may recall political compromises that finally led a rural-oriented and rural-dominated legislature—probably chiefly persuaded by the availability of federal subsidies—to give statutory authorization for some form of urban renewal. And he may remember court tests wherein conservative judges were laboriously convinced that under some circumstances, the state and federal constitutions allow property to be taken from one man and transferred through the hands of a local governmental agency to another private citizen—and even permit tax revenues to be spent and municipal bond issues to be floated to facilitate this process.

But how did the local program of our imagined urban renewal official come into being? Probably its genealogy was confused, and at birth it had appeared "all things to all men." To the city's humanitarians, urban renewal seemed an effective weapon forged by aid of the police power to eliminate slums and blight—and their accompanying health, safety, and moral hazards. To hardheaded, somewhat skeptical taxpayers, it justified itself by its proposed exchange of slums, which drain off city tax dollars, for modern, redeveloped areas, providing substantial new property values and accompanying tax revenues.[5] To civic promoters, urban renewal promised a means to resuscitate the downtown business area, already woefully weakened by suburban shopping centers; to provide prime commercial and industrial sites with which to lure new business; to revise and remove horse-and-buggy traffic patterns;

[1] See Foard & Fefferman, *Federal Urban Renewal Legislation*, 25 LAW & CONTEMP. PROB. 635 (1960).
[2] 63 Stat. 413, 42 U.S.C. §§ 1441-83 (1958).
[3] 68 Stat. 623, 42 U.S.C. §§ 1450-60 (1958).
[4] 73 Stat. 672, 42 U.S.C. §§ 1450-60 (Supp. 1960).
[5] For a discussion of the economics of urban renewal and economic criteria in evaluating it, see Davis & Whinston, *The Economics of Urban Renewal*, *infra*, p. 105.

and, generally, to enhance the city's attractiveness. To builders, the availability under urban renewal of new construction opportunities, together with unique financial assistance, afforded ample incentive to push the program. To some property owners, it presented an unexpected market for their run-down properties. To pump-primers generally, urban renewal's appeal of new jobs and more money in circulation was well-nigh irresistible. And, last but certainly not least, to persons—mostly members of minority groups—living in the blighted areas, the program appeared to offer a federally-paved escape route from long-experienced squalor into a promised land of decent housing.

As he looks back, the urban renewal official may marvel that his program has managed to overcome so many formidable obstacles. For instance, the structure of the city government may originally have been antiquated and unsuited for a strenuous urban renewal enterprise.[6] Although the formulation of a Workable Program aided in focussing on the problem,[7] it may have proved difficult to coordinate urban renewal with the city's planning and building inspection activity. The mayor or city manager and the board of aldermen may have delayed to the utmost in facing up to the unpleasant budgetary realities of effectuating urban renewal. Public housing officials may sometimes have been out of step with urban renewal, or else have treated it merely as a stepchild of their own program. Some members of minority groups, either by political action in connection with bond issue votes or by legal action, may have protested certain features of the urban renewal plan that they felt sacrificed their own interests on the altar of general city progress. Some property owners, unable to find suitable reinvestments, disturbed by possible tax implications for them of a sale of their slum property, and cherishing exaggerated opinions of the value of such property—usually owned for investment purposes rather than as residences—may have necessitated a series of troublesome condemnation proceedings.

There may also be memories of trips to the state capital to testify or lobby for amendments to the state urban renewal law in order to facilitate the city's urban renewal program—by streamlining eminent domain procedures through authorization of "quick-taking";[8] by providing for conservation and rehabilitation projects as supplements, and sometimes alternatives, to acquisition and clearance;[9] by obtaining a mandate from the legislature to renew business areas in the city's downtown core; by seeking more flexible and varied means for disposing of urban renewal property;[10]

[6] The public administration problems in executing the urban renewal program are discussed in Duggar, *The Relation of Local Government Structure to Urban Renewal*, *infra*, p. 49.

[7] See Rhyne, *The Workable Program—A Challenge for Community Improvement*, 25 LAW & CONTEMP. PROB. 685 (1960).

[8] Some of the problems connected with the use of eminent domain for urban renewal, including proper compensation for the property owner, are dealt with in Dagen & Cody, *Property, et al. versus Nuisance, et al.*, *infra*, p. 70, and Berger, *Current Problems Affecting Costs of Condemnation*, *infra*, p. 85.

[9] See the increasing importance of conservation and rehabilitation, as emphasized by Zwerner & Osgood, *Rehabilitation and Conservation*, 25 LAW & CONTEMP. PROB. 705 (1960).

[10] The need for greater flexibility and less red tape in disposition of urban renewal land is stressed in Brownfield, *The Disposition Problem in Urban Renewal*, 25 LAW & CONTEMP. PROB. 732 (1960).

and so on. Perhaps the trips had been made to appear before the state's highway authority or commission to urge that its planning and programming be coordinated with the city's urban renewal activities. Sometimes they may have extended to the Urban Renewal Administration's regional office to discuss the planning or execution of a project; to the nearest Federal Housing Administration office to discuss requested loan guarantees for a redeveloper or for a builder of relocation housing; or even to Washington to seek information or assistance.

Then there has been the problem—a very significant contemporary one—of clearing away a mountain of paperwork, which accompanies any federal program and in urban renewal is all the heavier by reason of the additional participation of local government and private entrepreneurs. Add to this the public hearings on urban renewal and the innumerable speeches and reports which an urban renewal official must make—to the board of aldermen, to property owners' associations and the board of realtors, to citizens' committees organized as a means of liaison with persons in blighted areas, to civic clubs, and so on—and on.

Our retrospective urban renewal official may remember the first demolition performed in execution of the urban renewal plan—although, owing to the usual unexpected delays, perhaps a year behind the schedule that he had optimistically, but unrealistically, set for himself at the outset. With clearance begun there was at last something tangible to show as a product of urban renewal; but long before then, relocation problems had been posed.[11] When should the intended relocatee move? Should he wait until the bulldozer reached his front door? How should reimbursable moving costs for relocating individuals and businesses be computed? Although the loan guarantee programs under sections 220[12] and 221[13] made available special financial assistance at relatively low interest and with extraordinarily lengthy amortization, difficulties often may have occurred in establishing that the relocatee had a credit rating that would qualify him for such a loan—this task often being especially hard where members of minority groups are involved. FHA officials may have not rushed forward to make loans under programs with which they were relatively unfamiliar; sometimes their appraisals of relocation housing may have fallen so low as to slice away the builder's profit margin and discourage him; some builders also may have eased away from an unfamiliar type of loan guarantee program.

To some extent, shortages of relocation housing possibly could have been met by public housing facilities. However, public relations problems may often have been created by the circumstance that some persons favorable to urban renewal vigorously opposed public housing and could not be persuaded that in providing "decent, safe, and sanitary" housing for relocation,[14] urban renewal can seldom be completely inde-

[11] See Millspaugh, *Problems and Opportunities of Relocation, infra*, p. 6, for a general treatment of relocation.

[12] Sec. 220, 68 Stat. 596 (1954), 12 U.S.C. § 1715k (1958).

[13] Sec. 221, 68 Stat. 599 (1954), 12 U.S.C. § 12151 (1958).

[14] 63 Stat. 416 (1949), as amended, 68 Stat. 625 (1954), 42 U.S.C. § 1455(c) (1958).

pendent of public housing facilities. To the extent that sufficient public housing units were available to shelter relocatees for whom other relocation housing was unavailable, there may often have been further problems. For instance, public housing officials may not especially have welcomed relocatees whose low income qualified them for public housing but who had lengthy records of crime and misconduct. Weighing the entire process of relocation, the renewal official may ask himself: "Was enough done in taking advantage of the aids that have been made available for relocation—in seizing the opportunity presented by relocation?[15] Or did we simply relocate persons from an old slum into a newer one?"

As for property disposition, this hypothetical official may recall many a headache—some still throbbing. Although studies of land marketability had been made as the original project planning proceeded, the necessary time lag in executing urban renewal projects may have rendered obsolete some of the data. In several instances, new businesses had proposed to purchase land acquired for urban renewal by the Local Public Agency and to build impressive buildings thereon; but, as an inducement, they may have sought either a writedown in the sales price of the land far below its fair value, or else an exemption from future property taxes on the land to be acquired. Granting such concessions was infeasible—even assuming that the state constitution authorized the giving of special privileges of this sort.[16] In other instances there may have been negotiations for long-term leases of urban renewal land,[17] so that the lessee could acquire federal income tax deductions for the rental payments and the Local Public Agency could capitalize on its tax-exempt status with respect to the rental payments. And there has been the perennial problem of balancing the qualifications of redevelopers who would be sure to do a high-quality, aesthetic job against those of redevelopers who have made the highest offers for the property to be disposed of. Moreover, some of the persons who had owned land acquired for urban renewal may not have understood why they could not automatically repurchase their own land after clearance occurred; they may have remained unimpressed by explanations that state law and the state constitution would not allow them to receive any sales preference with respect to the public at large, and that, besides, their former tracts of land had been irrevocably and inextricably merged with other urban renewal land.

After pondering on these and other formidable contemporary problems with which urban renewal may thus far have confronted him, our supposititious official will undoubtedly experience pride and satisfaction at what he has already accomplished against sometimes tremendous odds—along with a realization that he will be challenged in the future by many other, often now unsuspected, problems.

[15] Millspaugh makes a special contribution in his article, *infra* note 11, by stressing the opportunities implicit in urban renewal.

[16] See Slayton, *State and Local Incentives and Techniques for Urban Renewal*, 25 LAW & CONTEMP. PROB. 793 (1960).

[17] The use of leases in urban renewal disposition is analyzed in Brownfield & Rosen, *Leasing in the Disposition of Urban Renewal Land*, *infra*, p. 37.

The editors of *Law and Contemporary Problems* hope that any such official—and many other persons—will deem the present symposium to be of aid in evaluating the tumultuous and confusing past experiences in urban renewal and the correctness of past solutions,[18] in analyzing present problems and foreseeing new ones,[19] and in recognizing the magnitude and importance of the task that lies ahead.[20]

ROBINSON O. EVERETT.

[18] For a critical evaluation of some past solutions, see Leach, *The Federal Urban Renewal Program: A Ten Year Critique*, 25 LAW & CONTEMP. PROB. 777 (1960).

[19] From the redeveloper's standpoint, the problems of urban renewal are analyzed in Goldston, Hunter & Rothrauff, *The Viewpoint of Counsel for a Private Redeveloper, infra*, p. 118.

[20] See Walker, *A New Pattern for Urban Renewal*, 25 LAW & CONTEMP. PROB. 633 (1960).

PROBLEMS AND OPPORTUNITIES OF RELOCATION

MARTIN MILLSPAUGH*

I

THE SETTING

As the city-rebuilding movement enters its second decade of operation and growth, one often hears relocation described as "the Achilles heel of urban renewal." The words carry a warning that is clear enough: If the relocation phase is not managed successfully, urban renewal can do enough damage to families and businesses to create a wave of reaction—a reaction that might be sufficient to stop the momentum of the urban renewal process itself. There is ample justification for this view. Relocation is a difficult business at best—full of heartbreak and laced with human problems that go to the very nature of urban life. Already, serious voices are asking: Is it worth it?[1] On June 27, 1960, after a debate devoted in large part to the relocation question, the House of Representatives voted 348 to 35 to pass the Rabaut bill,[2] which would stop all urban renewal in the District of Columbia until construction is completed in fifty per cent of the District's huge Southwest Redevelopment Area.[3] The size of this vote, encompassing congressmen from all parts of the country, and from urban as well as rural constituencies, underlines the seriousness of the issue.

But this is only one side of the coin. In the "Achilles heel" view, relocation is regarded primarily as a responsibility—a sometimes unpleasant duty that must be discharged before we can get on with the more exciting business of rebuilding a city. This ignores the very real benefits that many families and businesses can reap from the process of relocation: the social problems that are brought to light for the first time and given expert, specialized attention; the lifting of the aspirations of families who did not know they could live in a better environment; the business opportunities uncovered by firms that are forced to give up their customary

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The writer is indebted to Albert M. Copp, Program Analyst in the Urban Renewal Administration, who conducted much of the research for this paper, and to members of the Relocation Branch, Urban Renewal Administration, who gave freely of their experience and advice. The conclusions expressed, however, are the writer's own.

[1] For critiques of the relocation side of urban renewal, see Gans, *The Human Implications of Current Redevelopment and Relocation Planning*, 25 J. AM. INST. OF PLANNERS 15 (1959); ROBERT G. HOWES, CRISIS DOWNTOWN: A CHURCH EYE-VIEW OF URBAN RENEWAL (1959).

[2] 106 CONG. REC. 13526-533 (daily ed. June 27, 1960).

[3] H.R. 8697, 86th Cong., 2d Sess. (1960), passed House on June 27, 1960, referred to Senate Committee on the District of Columbia on June 28, 1960. No further action was taken.

day-by-day habits. Any experienced relocation officer can recall such cases. Here space permits us to cite only one source. Shortly after the House action on the Rabaut bill, the Washington Housing Association made its own investigation of the relocation record in the District's Southwest Area. The WHA staff concluded:[4]

> Relocation is never easy. When dealing with over 20,000 persons who must move, whether they want to or not, many deeply attached to their neighborhood, some dissatisfaction, disappointment and heartbreak are inevitable. But WHA is confident that the overwhelming number of families who accepted . . . relocation assistance improved their housing considerably—some became home owners for the first time, some literally started new lives with new opportunities to enter into the main stream of community life.

Nationally, the available statistics bear out this conclusion, in superficial terms at least. The records of the Urban Renewal Administration (URA) indicate that only twenty per cent of the occupants of urban renewal areas enjoy standard housing conditions before relocation takes place, while eighty per cent are in substandard housing.[5] After relocation, according to records compiled for 65,800 families in 143 cities, seventy-three per cent have obtained standard housing, twenty per cent have moved to quarters of which the condition is unknown, and only seven per cent are known to have relocated in substandard housing.[6]

This record appears hopeful; certainly the momentum of urban renewal generally has not yet been slowed down by relocation difficulties. But the real impact of the relocation job is just beginning to be felt. Urban renewal, or at least the federally assisted portion of it, has only recently moved into the execution phase on a large scale. During the fiscal year ending on June 30, 1960, approximately ninety projects received federal loan and grant contracts for carrying out execution activities, compared with twenty-six in fiscal 1955. The rapid growth of project execution work is bringing the cities face-to-face, for the first time, with the magnitude of the relocation load that is generated by a full-scale local urban renewal program. There were an estimated 260,000 families to be relocated from 495 federally assisted projects that had reached or completed the final planning stage by June 30, 1960.[7] And urban renewal, of course, is only one of many causes of the displacement of families by government action. It is estimated that the total annual displacement may be three times that caused by urban renewal alone.[8]

Clearly, the relocation question must be candidly and creatively faced if the cities of America are going to transform themselves, through urban renewal and other community development activities, to accommodate the needs of our future urban population. The responsibility of the community and the problems involved

[4] WASHINGTON HOUSING ASS'N, NO SLUMS IN TEN YEARS 2 (1960).

[5] URBAN RENEWAL ADMINISTRATION, HOUSING AND HOME FINANCE AGENCY, URBAN RENEWAL PROJECT CHARACTERISTICS 9 (1959). The classifications "standard" and "substandard" are based on definitions developed by each locality.

[6] Urban Renewal Administration statistics (unpublished).

[7] *Ibid.*

[8] Statement of Albert M. Cole, Administrator, Housing and Home Finance Agency, in *Hearings Before a Subcommittee of the Senate Committee on Banking and Currency on the Housing Act of 1958*, 85th Cong., 2d Sess. 73 (1958).

in meeting that responsibility will be discussed below; but also, and possibly even more important, the question of whether relocation should be a positive program in its own right. Can relocation, in other words, cease to be merely an obstacle and take its place beside planning, redevelopment, public works, public housing, rehabilitation, and conservation—as another strong arm of the community development process?

II

HISTORICAL

Slum clearance, and the construction of new housing in the place of substandard, blighted homes, got its start under the operations of the Public Works Administration, in the early 1930's. Here, as a means of expediting the land-clearance phase of the program, financial assistance was sometimes made available to the families being displaced. When the United States Housing Act of 1937[9] transferred this program to the United States Housing Authority (predecessor of the Public Housing Administration), administrative procedures were adopted requiring local housing authorities to develop plans for the relocation of slum dwellers who were displaced from public housing sites. Between 1937 and the passage of the Housing Act of 1949,[10] the responsibility for relocation was recognized here and there in other clearance and rebuilding activities, both public and private.[11] When World War II ended, and the backlog of construction needs created an unprecedented public building boom at a time when the nation also faced a critical housing shortage, the task of relocating families and businesses from the path of progress took on massive proportions. Most of the states and cities that established slum-clearance and redevelopment programs prior to 1949 made some provision for relocation. These provisions were superseded by the requirements of the federally-assisted program that was established by Title I of the Housing Act of 1949.

The 1949 Act made it clear that relocation was a public responsibility and an essential feature of slum clearance. The act required a local public agency carrying out a redevelopment project to have a "feasible method" for relocating displaced families; it required a showing of the rehousing resources (with a specific reference to the postwar housing shortage); and it provided for priority in public housing for families displaced from redevelopment areas, as well as from public housing sites.[12] The administrative rules based on this act permitted the payment of a displacee's moving expenses and first month's rent, but only when necessary to move a family off the site; the total amount of financial assistance in each project

[9] 50 Stat. 888, as amended, 42 U.S.C. § 1401 (1958).

[10] 63 Stat. 413, 414, as amended, 68 Stat. 622 (1954), 42 U.S.C. §§ 1441, 1450 *et seq.* (1958).

[11] For an account of the development of various relocation activities in one city, Chicago, see Meltzer & Orloff, *Relocation of Families Displaced in Urban Redevelopment: Experiences in Chicago*, in COLEMAN WOODBURY (ED.), URBAN REDEVELOPMENT: PROBLEMS AND PRACTICES 407 (1953). The authors cite a classic case of privately-conducted relocation: the program conducted by Metropolitan Life Insurance Company at a cost of $200,000, to move 3,000 families from the site of the Stuyvesant Town development in New York City in 1944.

[12] 70 Stat. 1097, 42 U.S.C. § 1455(c) (1958).

had to be less than the estimated combined cost of the delays and eviction proceedings that would result from families refusing to move.[13] This rationale called for financial assistance as an incidental cost of redevelopment, rather than for the benefit of the displacee.

The next significant federal law from the point of view of relocation was the Housing Act of 1954,[14] which converted slum clearance and redevelopment to "urban renewal," and made possible the creation of the URA as a full-fledged constituent of the Housing and Home Finance Agency (HHFA). The emphasis was shifted from individual redevelopment projects to the concept of "an effective program . . . for attacking the entire problem of urban decay."[15] With respect to relocation, this involved: (1) the rehabilitation of structures wherever they could be salvaged (replacing the total clearance concept and thus easing the potential relocation pressures); and (2) the requirement that a city adopt a "workable program . . . for effectively dealing with the problem of urban slums and blight within the community,"[16] which has been interpreted by HHFA to include a rehousing program for displaced families.[17] The 1954 Act also established the approval of a local public agency's relocation plan as a nondelegable function of the Housing Administrator.

Two years later, in the Housing Act of 1956,[18] it was determined for the first time that displacees could receive financial assistance as a matter of right, rather than as a means of expediting the slum-clearance process. Local public agencies were authorized (though not required) to make payments to all dislocated families, individuals, and businesses for "reasonable and necessary moving expenses and any actual direct losses of property," up to a maximum of $100 per family or individual, and $2,000 per business establishment. There were doubts whether state laws and constitutional provisions would permit local public agencies to extend compensation in excess of an acquisition award; so the 1956 Act provided for the relocation payments to be absorbed by a 100 per cent federal grant. In 1957, the payment limit for businesses was increased to $2,500, and the law was amended to allow HHFA to permit a local public agency to make fixed payments in lieu of actual moving expenses to all eligible families and individuals.[19] In the Housing Act of 1959, both family and business limits were increased, to $200 and $3,000, respectively, and the coverage of relocation payments was expanded to include those who move from properties acquired in an urban renewal project by any governmental action, or code enforcement, or rehabilitation connected with the project.[20]

[13] URBAN RENEWAL ADMINISTRATION, HOUSING AND HOME FINANCE AGENCY, MANUAL OF POLICIES AND REQUIREMENTS FOR LOCAL PUBLIC AGENCIES, pt. 2, ch. 6, § 4 (May 16, 1951, superseded).

[14] 68 Stat. 590, 12 U.S.C. § 1703 (1958).

[15] PRESIDENT'S ADVISORY COMM. ON GOVERNMENT HOUSING POLICIES AND PROGRAMS, REPORT 1 (1953).

[16] 63 Stat. 414 (1949), 68 Stat. 623 (1954), 42 U.S.C. § 1451(c) (1958).

[17] HOUSING AND HOME FINANCE AGENCY, HOW LOCALITIES CAN DEVELOP A WORKABLE PROGRAM FOR COMMUNITY IMPROVEMENT 44-46 (1960).

[18] 63 Stat. 417, as amended, 70 Stat. 1100, 42 U.S.C. § 1456(f) (1958).

[19] 63 Stat. 417, as amended, 71 Stat. 300, 42 U.S.C. § 1456(f) (1958).

[20] 63 Stat. 417, as amended, 73 Stat. 674, 42 U.S.C.A. § 1456(f) (Supp. 1959).

The Housing Act of 1959 contained another section of great significance for relocation. It provided for a new program of grants to assist localities in the preparation of "community renewal programs," designed to appraise a locality's total need for all types of renewal measures and its total resources for putting those measures into effect.[21] With this information, a community can determine the maximum rate at which urban renewal can be carried out in relation to local conditions, and proceed to schedule its operations—both federally assisted and nonassisted—in order to eliminate blight in all its forms. In proposing this legislation, HHFA spokesmen made it clear that the extent of relocation resources was one of the principal factors governing the rate at which a community could move ahead with urban renewal, and that it is important to measure such limitations on a community-wide basis before an all-out program for the elimination and prevention of slums and blight is attempted.[22]

As the federal urban renewal statute now stands, it is also important to note a dual emphasis in the relocation provisions: first, on rehousing and relocation *requirements* (the local public agency must have a satisfactory relocation plan and furnish evidence of adequate rehousing resources); and, second, on relocation *payments*. The requirements, covered by section 105(c) of the act,[22a] apply only to families, while the payments, covered by section 106(f),[22b] may be made to families, individuals, and businesses. The URA encourages local public agencies to provide the same relocation and referral services for individuals and businesses as they do for families, but it is not obligatory.

It is curious that in ten years of activity under Title I of the Housing Act of 1949, as amended, there has not been a great deal of litigation in the field of relocation. Of the few cases that can be cited,[23] none has so far had a profound effect on the law or administrative requirements governing relocation activities. The major battles of litigation, if there are to be such, lie in the future. In fact, the time may be passing when the law of relocation will stand or fall on the urban renewal provisions in Title I. Since 1949, there has been a growing awareness of the relocation problems caused by the acquisition of property for other public purposes. Twice, in 1955 and 1958, the National Association of Housing and Redevelopment Officials has adopted resolutions urging that relocation assistance be provided in other federal,

[21] 63 Stat. 380, as amended, 73 Stat. 672, 42 U.S.C.A. § 1453(d) (Supp. 1959).

[22] Statement of Richard L. Steiner, Commissioner, Urban Renewal Administration, in *Hearings Before a Subcommittee of the Senate Committee on Banking and Currency on the Housing Act of 1958*, 85th Cong., 2d Sess. 125-26 (1958).

[22a] 63 Stat. 416, as amended, 70 Stat. 1097, 42 U.S.C. § 1455(c) (1958).

[22b] 63 Stat. 417, as amended, 71 Stat. 300, 42 U.S.C. § 1456(f) (1958).

[23] Hunter v. City of New York, 121 N.Y.S.2d 841 (Sup. Ct. 1953); McAuliffe & Burke Co. v. Boston Housing Authority, 334 Mass. 28, 133 N.E.2d 493 (1956); Gart v. Cole, 166 F. Supp. 129 (S.D.N.Y. 1958), *aff'd*, 263 F.2d, 244 (2d Cir. 1959), *cert. denied*, 359 U.S. 978 (1959); Tate v. City of Eufaula, 165 F. Supp. 303 (M.D. Ala. 1958); Barnes v. City of Gadsden, 174 F. Supp. 64 (N.D. Ala. 1958), *aff'd*, 268 F.2d 593 (5th Cir. 1959), *cert. denied*, 361 U.S. 915 (1959); Housing and Redevelopment Authority of the City of Minneapolis v. Minneapolis Metropolitan Co., 104 N.W.2d 864 (Minn. 1960).

state and local programs.[24] The principle has been slow to catch on, however. In 1951 and 1952, relocation payments were provided for occupants of properties acquired by the Department of Defense, and similar legislation was enacted in 1958 for the water conservation and development projects of the Bureau of Reclamation, Department of the Interior.[25] In 1959, the General Services Administration requested Congress to authorize relocation payments for projects involving land acquisition by any agency of the executive branch.[26]

It has been suggested by a number of sources that the federal-state highway program should make some provision for relocation assistance, but no national legislation has yet been adopted. On the future of relocation payments generally, however, a straw in the wind may be furnished by the law passed by the Maryland legislature in 1959, which requires the payment of moving costs to those who are displaced by any form of public acquisition, whether by the state itself (as in the case of the highway program) or by local action.[27]

III

PROBLEMS

A. Housing Resources

Had the safeguards for displaced families not been included in section 105(c) of the Housing Act of 1949, there is some doubt that the act could have mustered enough votes for passage. These basic ground rules—the relocation requirements of 1949—have remained virtually unchanged to this day. Before obtaining a federal loan or grant to carry out a project, a local public agency must show:

1. that it has a feasible method for relocating the families living in properties to be acquired; and
2. that standard housing units will be available to the displaced families
   a. at rents or prices they can afford,
   b. in areas "not less desirable" than the project area with respect to utilities and facilities, and
   c. in locations accessible to the relocatees' places of employment.

Obviously, there are only two sources of relocation housing: public housing, in the form of either new units or vacancies, and the private housing supply.

1. *Low-rent public housing*

From surveys of the income reported by families displaced by urban renewal, it appears that slightly more than fifty per cent would be eligible for low-rent public

[24] NAT'L ASS'N OF HOUSING AND REDEVELOPMENT OFFICIALS, RECOMMENDATIONS ON RELOCATION POLICY 1-3 (1960).

[25] 72 Stat. 152, 43 U.S.C. § 1231 (1958).

[26] S. 2583, 86th Cong., 2d Sess. (1960), passed by the Senate, June 3, 1960; referred to the House Committee on Government Operations on June 6, 1960. No further action was taken.

[27] Md. Laws 1959, ch. 688.

housing.[28] This figure, or one close to it, is often cited as a measure of the need for public housing that is created by urban renewal. It is unsettling to discover, therefore, that of the families relocated in the past, less than twenty per cent have actually moved into public housing.[29] Several local studies show an even greater discrepancy; in the first two years of operation of Philadelphia's central relocation office, eighty per cent of the dislocated families were found to be eligible for public housing, sixty-seven per cent were referred to public housing, but less than fifteen per cent moved in.[30] In a survey of families to be relocated from New York's West Side Renewal project, it was found that sixty-eight per cent were apparently eligible, but only sixteen per cent said they wanted to live in public housing.[31]

It should be pointed out that some of the families who are within the income limits for public housing are disqualified for other reasons: they may be considered undesirable (families have been barred from public housing because of police records, alcoholism, illegitimacy, rent delinquency, gambling, disorderly conduct, mental or physical illness, social disease, or juvenile delinquency);[32] or the family income may be *too low* (a public housing project must have enough income to pay operating costs, and hence it is sometimes necessary to maintain a distribution of incomes which shrinks the number of units available to very-low-income families); or a family may be too large for the available public housing units (many local housing authorities, like the population experts, failed to foresee the national growth in number of children per family, and until recently, the Public Housing Administration's cost limit of $17,000 per unit militated against the construction of large units).

But even when these mechanical causes have been accounted for, there is evidence of a rejection of public housing by many of those who, theoretically, are most in need of it. Several investigators have attempted to identify the reasons for this.[33] Their findings can be grouped under four headings: (1) the desire to stay close to the old neighborhood, whether public housing is available there or not; (2) the feeling that a stigma attaches to residents of public housing; (3) an unwillingness to accept the rules and regulations that go with publicly administered housing (among other things, slum families often wish to spend a smaller proportion of family income on housing than is required in public housing); and (4) dislike of the physical character of public housing projects (relocatees mentioned distaste for elevator living, for concrete floors, and so on).

Clearly, the relocation plan for an urban renewal project will break down in operation if the standard rehousing resources for low-income families are calculated

[28] Urban Renewal Administration statistics (unpublished). The figure was actually 52% as of June 30, 1959.

[29] *Ibid.* The figure was 18% as of June 30, 1959.

[30] PHILADELPHIA HOUSING ASS'N, RELOCATION IN PHILADELPHIA 29 (1958).

[31] CITIZENS HOUSING AND PLANNING COUNCIL OF NEW YORK, COMMITTEE ON URBAN REDEVELOPMENT, TOWARD A BETTER NEW YORK: A REPORT ON THE URBAN RENEWAL PROBLEMS OF THE CITY, WITH RECOMMENDATIONS 14-15 (1960).

[32] *Cf.* PHILADELPHIA HOUSING ASS'N, *op. cit. supra* note 30, at 22-23.

[33] *Id.* at 30; Gans, *supra* note 1, at 28.

solely from the number of available public housing units, while more than half of the low-income families relocate elsewhere. The "elsewhere" in this case may mean substandard housing, or housing beyond their means. Solutions for this problem are not easy to find, but it has important implications for those who are responsible for the administration of urban renewal programs. This has not gone unrecognized, and already public housing is being re-examined from many perspectives. The avenues that appear most promising from the relocation point of view are: (1) possible revision of the formula governing project income versus operating costs; (2) provision of social work resources in a manner that would permit admission of more of the "problem families" (perhaps an answer lies in the creation of "staging areas," where undesirable families can be rehabilitated before assignment to a regular project); (3) a crash program for the construction of large-family units—perhaps through the purchase and rehabilitation of existing homes; (4) exploration of the possibilities of relocating groups of families, who are related by kinship or ethnic ties and wish to remain together, in blocks of public housing units; (5) experimentation with new forms of public housing—forms that would eliminate the stigma from public housing projects, the institutional character of the physical structures, and possibly some of the need for managerial red tape. A list of the new directions that have been suggested or tried in this field would run partially as follows:

a. rehabilitation of single-family homes in existing neighborhoods for public housing use;
b. construction of single-family homes in public housing projects;
c. construction of "vest pocket" projects on sites scattered through existing neighborhoods;
d. arrangements to permit public housing tenants to start buying their homes when their incomes exceed the limits for continued occupancy.

In addition to these suggestions for reorientation of the public housing program, several communities have experimented with other forms of subsidies for low-income displacees. Most common is the practice of making city funds available to pay the difference between the rent a relocatee can afford to pay and the rent in his new quarters.[34] However, in some localities, foundations and other philanthropic groups supply these funds.[35]

Finally, Dr. Ernest M. Fisher, of Columbia University, has suggested a broad-scale reorganization of the urban renewal and public housing programs, so that the housing needs and the housing resources created by community development activities could be merged into one context, with a single administrative focus and a single contract with the federal government.[36] Dr. Fisher's detailed recommendations deserve careful study; space permits mention here of only two, which appear to be possible of statutory and administrative implementation: (1) the creation of a

[34] Examples of cities employing this practice are Battle Creek and Port Huron, Mich., and Madison, Wis.

[35] East Chicago, Ind., Fargo, N.D., and Topeka, Kan., among others, may be cited as illustrations here.

[36] ERNEST M. FISHER, A STUDY OF HOUSING PROGRAMS AND POLICIES (1960).

"graded inventory" of public housing units, ranging from minimum quality rental units to new subdivision housing purchased from private home builders; and (2) the provision of public housing loans for indigent slum home owners, to enable them to rehabilitate their homes, instead of being forced to relocate and thus join the public housing caseload.

2. *Private housing*

Thus far, we have discussed only the rehousing resources for the fifty per cent of displaced families who are eligible, in terms of income, for public housing. The remaining fifty per cent present an even more complex picture. Presumably, a great many fall into the categories that have been the subject of more recent controversy and debate than any other facet of urban life: the "middle-income" or "lower-middle-income" family. Definitions of these categories are as numerous as proposals for middle-income housing solutions. Until recently, a convenient definition of the "lower-middle-income" group was provided by the statutory twenty per cent gap between the incomes of families served by the private housing market and the incomes of families who could be served by public housing. The Housing Act of 1959, however, provided that for families dislocated by governmental action, the gap may be reduced to five per cent, or, in effect, eliminated.[37]

There will be no attempt made here to suggest ways of solving the middle-income housing riddle. The supply of housing at almost any level of income is a matter of concern for families within that level, whether they are dislocated or not. Obviously, no massive community development program is likely to succeed if adequate housing is not available at the proper price and in the proper location for the families who will be shifted about by governmental and private development actions. There are two aspects of the housing supply picture, however, which are directly related to the urban renewal program.

First, it is now clear that, in the short run at least, slum clearance tends to reduce the quantity of housing available to the families who lived in the slum. In most cases, the new housing which is being built on cleared sites in urban renewal projects is high-rise, high-cost, and therefore relatively high-rent housing. Unless existing statutes or practices are changed, displacees will seldom be housed in the area where they lived before. This was one reason for the widespread acceptance of the rehabilitation emphasis in the Housing Act of 1954: the relocation load will be reduced if clearance affects only those structures that cannot be rehabilitated. But experience is showing that rehabilitation, too, causes displacement, although usually less than is caused by clearance. This happens in two ways: through code enforcement, which eliminates overcrowding and dislocates the excess occupants, and through the increased rents that may be required to finance necessary improvements to the structure.

Second, while all families may be faced with the housing supply question, the problem that is peculiar to displaced families is *timing;* displacees have little or no control

[37] 50 Stat. 895 (1937), as amended, 73 Stat. 680 (1959), 42 U.S.C.A. § 1415(7)(b) (Supp. 1959).

over the fact that they must find a new dwelling unit, regardless of the housing supply and demand picture at the time. Furthermore, they must compete with others who also have no control over the timing of their appearance in the housing market. This includes the displaced families who are eligible for public housing but do not choose to accept it, new migrants moving into the city, new families created by population growth, and families who are displaced by other government and private development programs. As pointed out above, other public programs may displace twice as many families as urban renewal;[38] this ratio will undoubtedly increase, as the Interstate Highway program is completed in the rural spaces between cities and begins carving swathes through densely-populated urban areas.

Because families displaced by urban renewal have limited control over the decision to move, in a market where competition from other displaced persons is rising, the success of a relocation plan depends on: (1) the success with which vacancies can be located in standard existing housing, and (2) the provision of new units on the market at the right time and the right price. These two factors will be considered separately.

With respect to the location of suitable vacancies, a body of relocation expertise is growing up as the urban renewal program moves more widely into the execution phase. Normally, a relocation plan will call for the discovery and listing of suitable existing vacancies in the community, by size and by price; the inspection of vacant units to establish that they are decent, safe, and sanitary; and a procedure for referring dislocatees to a series of standard housing vacancies until a satisfactory rehousing solution is found. Localities are required by URA to provide for inspection of the dwelling units occupied by self-relocated families, as well as those relocated by the local public agency. It is important, obviously, that the relocation staff have access to qualified real estate advice, and that liaison be established with the local welfare department, which furnishes much of the rent money for the lowest-income families. There should also, if possible, be some method for identifying, and black-listing, slum landlords whose properties are known to be overpriced and poorly maintained.

In addition to these normal techniques, relocation administrators can vastly improve the success of their operations by imaginative use of possible sources of available housing. In Philadelphia, the central relocation agency discovered that foreclosure sales under GI mortgages produced forty to fifty houses a month—of which many were priced less than $10,000.[39] Municipal sales of tax-delinquent properties may provide another source. In many cities, the relocation staffs persuade local utility companies to supply a daily list of work orders for the discontinuance of service from houses and apartments. In New York City and several other cities, "finder's fees" are paid to real estate brokers who produce vacancies that can be used for relocation purposes.[40]

[38] See note 8 *supra*.

[39] PHILADELPHIA HOUSING ASS'N, *op. cit. supra* note 30, at 38.

[40] ANTHONY J. PANUCH, RELOCATION IN NEW YORK CITY 37 (1959).

It has been suggested at times that the granting of federal urban renewal assistance should be made contingent upon certain additional relocation practices (*i.e.*, make relocation payments only to families who move to standard housing; require redevelopers to build new relocation housing as part of the disposition agreement; adjust the amount of the federal capital grant according to the rent level of new housing to be built in the cleared area). Such methods do not appear desirable, because of possible interference with the free choice of the relocatees, or with the normal operation of community planning and the market for land. There can be little argument, however, with the suggestion that local public agencies should provide expert advice to relocatees who want to find their own housing or that the agencies should take some responsibility for seeing that new or rehabilitated housing is provided to meet the needs of dislocated families.

One of the Federal Housing Administration's (FHA) programs of mortgage insurance, created in 1954 under section 221 of the National Housing Act,[41] is designed expressly for the purpose of providing new and rehabilitated housing, at especially liberal terms, for families displaced by urban renewal and other government action. Since then, the "221 program" has not compiled an impressive record. Late in 1959, an exhaustive study compiled under the supervision of Albert Thompson, Special Assistant to the Housing Administrator, pointed up some disturbing facts, which are exemplified by the following figures:[42]

—although by the end of 1959 the HHFA had certified 299 localities as being eligible for a total of 105,448 units of section 221 housing, applications had been received for only 32,261 units, and only 18,371 had reached the start of construction;

—out of the 32,261 units covered by applications for section 221 mortgage insurance, only fourteen per cent involved the rehabilitation of existing housing;

—only thirty-two per cent of the new section 221 units constructed were actually occupied by displaced families (if no displacee appears to acquire a section 221 unit in sixty days after it is offered for sale, it may be sold on the open market);

—although section 221 has permitted the construction of rental units by nonprofit organizations since 1954, only eighteen per cent of the units applied for were rental units;[43]

—more than ninety per cent of the section 221 mortgages insured by FHA were being presented for purchase by the Federal National Mortgage Association (FNMA), rather than being retained by private investors.

[41] 68 Stat. 599, 12 U.S.C. § 1715*l* (1958).

[42] ALBERT THOMPSON, AN EVALUATION OF THE SECTION 221 RELOCATION HOUSING PROGRAM (1959). The statistics in this paragraph follow the organization of the Thompson report, but have been revised from the statistics given as of October 31, 1959, to those of December 31, 1959.

[43] Section 221 of the National Housing Act, as amended by § 110(c) of the Housing Act of 1959, authorized the construction of rental housing for profit, under certain conditions, although through July 1960, the FHA had received no applications.

What were the reasons for this unsatisfactory performance? The conclusions of the Thompson report can be summarized only briefly here. In general, the problems cited as working against success are the following:

1. a lack of understanding of section 221 by local officials and the local home-building and real estate industries (creating a lack of accurate information and advice for builders and potential buyers);

2. the difficulty of constructing new housing in some communities within the section 221 mortgage ceilings of $9,000 and (for high cost areas) $12,000;

3. the difficulty of finding sites for low-cost housing, particularly where there are rigid patterns of racial segregation;

4. sales prices which exeed the buying capacity of the displaced families;

5. the low credit standing of many displaced families, coupled with displacees' resistance to FHA processing delays and credit investigations;

6. lack of appeal, from the point of view of location and design, of some of the section 221 housing actually constructed;

7. the lack of a demonstrated technique for profitable rehabilitation of housing on a mass scale;[44] and

8. the difficulty of timing the production of new housing to coincide with the relocation of eligible families (both events depend on a multitude of variables, and are extremely difficult to predict).

In spite of the problems and the unsatisfactory record to date, however, the Thompson report found that not all the performance had been bad; and as a whole, the record improved after the terms of section 221 were liberalized by Congress in 1956. The larger cities had the worst record, it was found, but, on the other hand:[45]

> Section 221 accomplishment has been striking in some communities. It has provided excellent new construction and substantially improved housing available to low income displacees and especially to minorities.

Where section 221 housing has been a success, it has not only provided for an increase in home ownership, but also given the protection of a mortgage contract to low-income families who might otherwise have been forced to resort to installment purchase contracts, with all the accompanying pitfalls and possibilities for exploitation of an unwary or uninformed buyer. Since many displacees are ignorant of the techniques and legalities involved in a real estate transaction, this facet of section 221 has an importance that should not be overlooked.

In short, the record indicates that section 221 may have potentialities far beyond what has been demonstrated to date. The Thompson report points out the conditions that were present in most of the successful cases: community understanding and support for the program, the availability of low cost sites, and the ability to construct new housing within the statutory mortgage limits. Where these conditions

[44] Although isolated entrepreneurs have been successful in rehabilitating existing housing with § 221, there has been little evidence of large-scale duplication of their techniques.

[45] THOMPSON, *op. cit. supra* note 42, at 14.

were met, it has been possible to construct section 221 housing successfully, though this did not guarantee that the units would ultimately be occupied by dislocated families. In order to achieve a high ratio of success in this direction, it was found necessary to offer the units on the market at the right time; to canvass potential relocatee buyers so that their desires were met with respect to location, design, and price; and to merchandise the new units aggressively among dislocated families.

Through all of these findings, the single theme that stands out is the need for community understanding and support of a relocation housing program. If local public agency officials do not encourage and support the construction of new section 221 housing as an objective of the community, and provide both builders and buyers with the necessary information, assistance, and advice, private industry can hardly be expected to undertake the difficulties and risks of pioneering a complex new program. If real estate, home-building, and financial interests, on the other hand, do not assume some of that burden as a service to the community, no amount of official sympathy will get the housing built. But if both the community, through its local government officials, and the businessmen organize a creative,[46] aggressive approach to the problem, there is every indication that section 221 has a potential that is far from exhausted.

B. Moving Costs

The most universal problem that confronts the families displaced by urban renewal, or other government actions, is simply the cost of moving a home and all its accoutrements. As mentioned earlier, the federal law authorizes a local urban renewal agency to reimburse displacees for out-of-pocket losses attributable to "reasonable and necessary moving expenses and any actual direct losses of property," up to a limit of $200 for a family or individual[47] and $3,000 for a business. The cost is charged to a 100 per cent federal grant, which is added to the normal capital grant made to the local agency to help meet net project costs.

Experience has shown that in the case of families and individuals, the "losses of property" clause is either superfluous or unworkable; ninety-nine per cent of the total paid by the federal government has gone to cover moving costs. Furthermore, the $200 limit on payments for moving costs appears to be more than adequate in the great majority of cases; of the first 16,500 payments made to families, the average payment was $65.22.[48] Slum families are not, of course, overly encumbered with possessions. There may, however, be other costs involved in relocating a family, such as utility deposits, appliance installations, and payment of first month's rent in advance; or, if a home is purchased, down payments, closing costs, necessary altera-

[46] Examples of the creative approach have been provided by a southern mayor, who annexed land for section 221 housing when no suitable site within the city could be found, and by the formation in several northern cities of groups of financial institutions which accept section 221 mortgages on a pool basis, each one accepting a portion of the risk as a civic duty.

[47] Under a recent ruling of the Internal Revenue Service, such payments are not taxable as personal income. In the case of a business, the payment is offset by the actual expense, and thus eliminated from taxable income. See Rev. Rul. 60-279, 1960 INT. REV. BULL. No. 35, p. 8.

[48] Urban Renewal Administration statistics (unpublished).

tions, and decorating expenses. In addition, some families may suffer hidden or indirect costs, such as the loss of support from family members living nearby or the surrender of income-producing property that cannot be replaced.

No one has yet devised a simple means of providing for all the various losses that might be sustained by a displaced family, though attempts have been made to solve parts of the problem. In New York City, relocatees are paid bonuses in addition to the payment of moving expenses if they relocate themselves without the help of public authorities.[49] The Port of New York Authority has also made payments for decoration of the new dwelling unit, at a flat rate of $30 per room, up to a maximum payment of $210.[50] In the bill submitted to Congress by the General Services Administration last year,[51] authorization would be given to federal agencies to pay for closing costs on a new home and for time lost from employment during the move, in addition to moving expenses and losses of property. No one has successfully argued, however, that the Government should pay what are potentially the most expensive types of relocation costs—the difference between the acquisition award for an old property and the price of a new one, or the cost of major improvements at the new location. The most promising answers for these items appear to lie in the direction of improved acquisition appraisal techniques,[52] and perhaps a reduction (or moratorium) of rents during the period after acquisition and prior to the move, when a family's former home is owned by the local public agency.

With increasing frequency in recent months, questions have been raised about whether the present federally financed relocation payments are adequate, in the face of the actual cost of moving a home or business. Most often, however, the question is raised with respect to the dollar limits on the payments, rather than the type of costs that are eligible for reimbursement. Numerous bills introduced in the Eighty-sixth Congress would have provided for increases in the limits on federal payments or removed the limits altogether. The HHFA agreed that the existing limits result in some hardship (principally among some types of businesses), but the agency argued that the problem is not one to be solved by federal funds alone. As a result, the Administration suggested legislation that would permit higher limits wherever localities are willing (and permitted by state law) to include relocation payments in gross project costs—and, therefore, to share this expense in the same manner as the localities share in other normal project costs.[53]

It is not by any means established, as a matter of public policy, that the Government is liable for the reimbursement of all costs incurred by families and businesses which are dislocated by the acquisition of property for public purposes. In urban

[49] PANUCH, *op. cit. supra* note 40, at 37.

[50] *Ibid.*

[51] See note 26 *supra.*

[52] For a description of one group of property owners' complaints with respect to acquisition appraisal techniques, see 106 CONG. REC. 13529 (daily ed. June 27, 1960).

[53] Statement of David M. Walker, Commissioner, Urban Renewal Administration, in *Hearings Before a Subcommittee of the Senate Committee on Banking and Currency on Housing Legislation of 1960*, 86th Cong., 2d Sess. 125, 986, 988, 989 (1960).

renewal, the practice of reimbursement has been carried further than in almost any other field of public acquisition,[54] possibly because the public purpose behind slum clearance rests on a national responsibility, assumed by statute, to improve living conditions. Nevertheless, the lengths to which the Government should go in shouldering the expenses of displacees is still a question on which responsible policy-makers can and do differ. And the policies that may be adopted in urban renewal cannot be isolated from related policies in the highway program or in other forms of public development work.

There is one area, however, in which the rules of urban renewal could be strengthened in order to eliminate a possible source of inequity and hardship. It is in the timing of eligibility for relocation payments. Under existing interpretations of the law, families, businesses, and individuals are not eligible for relocation payments unless they move *after* the property is acquired in an urban renewal project. This excludes those who move soon after the announcement of a project, or during the lengthy planning period. It is not known how many displacees move under stress before their property is acquired, but relocation experts feel the number is substantial. There are serious administrative difficulties involved in any solution of this situation, but a solution is, nevertheless, being sought, at this writing, by the URA.

C. Special Problems

It is widely recognized that urban renewal generally, and slum clearance particularly, have an impact on the nonwhite minorities in our cities far beyond their numerical proportion of the population. Nonwhites are, typically, afforded less opportunity in the employment market and in the housing market, and hence very often make up the predominant group living in the slum and blighted areas that are to be renewed. Of 65,800 families relocated from urban renewal projects up to June 30, 1959, fully seventy-two per cent were nonwhite.[55] This has serious implications for the urban renewal program, because practically all of the problems faced by displaced families are intensified for families which belong to one of the nonwhite minorities.

Nonwhite families in the relocation load tend to have lower incomes than the white families (fifty-seven per cent of the nonwhites were apparently eligible for public housing, compared with thirty-eight per cent of the whites[56]). In addition to having lower incomes, they are often required to compete for rehousing space in a relatively restricted market. Historically, the gross supply of housing available to nonwhites has been proportionately less than the supply available to whites. Even

[54] A notable exception is found in the operations of some special purpose authorities. The Port of New York Authority, for instance, has made payments totaling up to $560 per family for bonuses, finders' fees, moving expenses, and decorating costs. Speech by Robert S. Curtiss, Director of Real Estate, Port of New York Authority, at the Annual Meeting of the Highway Research Board, Washington, D.C., Jan. 8, 1958.

[55] Urban Renewal Administration statistics (unpublished).

[56] *Ibid.*

where sufficient housing has been opened up for nonwhites to balance their proportionate share of the population, this housing is usually located in older, congested neighborhoods. Hence the problem is not merely one of finding access to existing housing, but also one of finding sites where new housing can be built to add to the supply available to nonwhites. The Thompson report on section 221 operations notes that "comments from widely separated sections of the country emphasize that this problem exists even in areas where community customs and patterns supposedly recognize no racial restrictions or where law prohibits them."[57] As a result of all these factors, the displaced nonwhite is likely to find that he is competing for relocation housing with a smaller income than the white displacee, while supply and demand factors increase the cost of standard housing that is available to him. As the Commission on Race and Housing reported in 1958: "Census statistics indicate that at every level of rent or market value, non-white renters and home owners obtain fewer standard quality dwellings and frequently less space than do whites paying the same amounts."[58]

There is still another element that militates against the dislocated nonwhite; his relatively poor credit standing in the community may make it more difficult for him to purchase new or existing housing on the best terms available to buyers generally. This problem arises from two factors: the unfamiliarity of many nonwhites with the operation of the housing market, and the unfamiliarity of many credit sources with the nonwhite buyer or borrower. A committee of the national Mortgage Bankers Association made a careful, objective analysis of this problem in 1955,[59] and the Thompson report noted that it was still a factor in 1959.[60]

It is obvious that the relocation of nonwhite families is liable to be considerably more difficult than the relocation of whites. There is no simple solution for the local public agency faced with this problem, but there is one positive value that arises from the nature of the relocation operation and the requirements of federal law and regulations. In urban renewal, the question of nonwhite housing resources must be brought into the open—and faced—in a way that is not normally required in any other field of activity. Certainly, if a solution is to be found, the first step is to strip away the emotional biases on both sides of the race question and identify the facts of the problem. In this way, urban renewal can contribute to the larger question of housing opportunities generally.

The relocation process can make other contributions as well. Careful relocation practices can contribute to the creation of stable, integrated neighborhoods, where a community is ready to accept this solution.[61] Through section 221, urban renewal

[57] THOMPSON, *op. cit. supra* note 42, at 19.

[58] COMM'N ON RACE AND HOUSING, WHERE SHALL WE LIVE 36 (1958).

[59] MORTGAGE BANKERS ASS'N OF AMERICA, REPORT OF THE COMMITTEE ON FINANCING MINORITY HOUSING (1955).

[60] THOMPSON, *op. cit. supra* note 42, at 19.

[61] This approach is especially applicable to middle-income, nonwhite families. Such cities as Columbus, Ohio, New Haven, Conn., Providence, R.I., York, Pa., and Washington, D.C., among others, have reported experiences of this sort.

can bring about the creation of new housing resources for nonwhites. The Thompson report found that:[62]

> In many communities Section 221 has made a significant contribution to the rehousing of displaced and other minority families. It has opened up new areas to minority occupancy and has made mortgage financing available to minority families who would otherwise not have been able to secure it.

Since October 1959, the FHA has required all section 221 housing units to be offered to displacees on an open occupancy basis, eliminating the racial "quotas" that were possible under earlier procedures.[63] In several states, moreover, state law requires that new housing built in urban renewal areas be marketed on an open occupancy basis.[64] Where redevelopment projects are designed for lower-cost housing, this sort of statute can be an important factor in expanding the supply of housing available to nonwhites.

Finally, those families who are unfamiliar with the elementary aspects of real estate operations—and are, therefore, subject to exploitation by sharp practitioners—can obtain expert advice and counseling through the urban renewal process. Outstanding pioneer work has been done in this field by several local renewal agencies[65] and such private organizations as the Fight Blight Fund in Baltimore, and Block-Blight, Inc., in Wilmington, Delaware. Services such as these are eligible as normal costs of an urban renewal project; and the transformation of an uneducated, vulnerable tenement dweller into a self-respecting and self-sufficient home owner can be one of the most dramatic and rewarding accomplishments of urban renewal.

Other groups which are faced with special problems as a result of relocation are elderly people and large families. The problem of housing large families has been mentioned in connection with the shortage of large units in public housing projects. Large family units are also more difficult to find in the private market, particularly if there is a modern housing code imposing stringent requirements with respect to occupancy limits. The slum, on the other hand, with its disregard of overcrowding standards and other middle-class amenities, has traditionally provided a resource of housing units for large families of limited income. If relocation is to be successful, a local public agency must tackle this problem with imagination and ingenuity. As mentioned previously, the best solution seems to lie in the direction of the rehabilitation and conservation of older existing homes—which were built in a time when construction costs per cubic foot of housing space were much lower.

[62] THOMPSON, *op. cit. supra* note 42, at 19.

[63] 6 FHA MANUAL Bk. 1, § 1, *Processing Appendix* (1959).

[64] As of October 1958, state antidiscrimination housing laws specifically applied to housing in urban renewal areas in Massachusetts, Minnesota, New Jersey, New York, Pennsylvania, Washington, and Wisconsin. Ordinances or resolutions on the same subject (not limited to particular projects) have been adopted in Cleveland, Ohio, New York City, St. Paul, Minn., and Los Angeles, Sacramento, and San Francisco, Cal. See HOUSING AND HOME FINANCE AGENCY, RACIAL RELATIONS SERVICE AND THE OFFICE OF THE GENERAL COUNSEL, NONDISCRIMINATION STATUTES, ORDINANCES, AND RESOLUTIONS RELATING TO PUBLIC AND PRIVATE HOUSING AND URBAN RENEWAL OPERATIONS (1958).

[65] Such as the agencies in Rochester, N.Y., St. Paul, Minn., Florence, Ala., Little Rock, Ark., New Haven, Conn., and Washington, D.C., among others.

The special problems that relocation creates for elderly persons arise largely from the limited incomes and abilities of the elderly persons themselves. It is generally known that the population as a whole includes an increasing proportion of the aged and aging, and a substantial proportion of these are likely to be ill or handicapped. In the 1950 Census, it was found that of the dwelling units occupied by families headed by persons sixty-five or older, thirty per cent were either dilapidated or lacked plumbing facilities, or both, compared with twenty-four per cent for younger families.[66] The needs of elderly people for special types of housing arrangements are now the subject of a growing professional literature, and there is no space to discuss that aspect here. It must be said, however, that the special needs of the elderly, frequently combined with a lack of earning power, create problems that may become critical when relocation is neecssary. Elderly home owners who have purchased their homes by thrift and hard work over the years may find that they are too old to obtain new mortgage terms within their limited means, and thus cannot replace the dearly-bought home that is being taken from them. This situation can be considerably more serious in cases where the home also supplies the sole source of income, from tenants or roomers. The mere matter of care and protection may also be a problem, especially with elderly women who have been living alone and are separated by relocation from the friends and neighbors who have looked after them.

In general, these factors make the relocation of elderly persons a delicate task, requiring more attention than the normal relocation operation. There are promising efforts under way to supply special housing resources for elderly persons through public housing, special FHA mortgage insurance terms for the elderly, and the Housing for the Elderly loan program initiated by the Housing Act of 1959.[67]

These efforts, and the relocation techniques that are being developed by local urban renewal agencies, will have more effective application if a community recognizes the problem of housing its elderly population as an important element of its general future development plans. This approach has been strongly recommended by the National Federation of Settlement Houses and Neighborhood Councils,[68] and should be given careful consideration by those responsible for official community objectives. From the more limited point of view of urban renewal, it has been pointed out that Title I of the Housing Act of 1949, as amended, requires a relocation plan and a demonstration of adequate rehousing resources for families, but not for individuals.[69] To the extent that elderly persons are classified in the latter category, they are afforded less legal protection than is normally provided for families. In

[66] COMM. ON HOUSING, WHITE HOUSE CONFERENCE ON AGING, BACKGROUND PAPER ON HOUSING (1960).

[67] 50 Stat. 891 (1937), 70 Stat. 1103 (1956), 73 Stat. 680 (1959), 42 U.S.C.A. §§ 1401, 1402, 1410 (Supp. 1959); 70 Stat. 1091, 12 U.S.C. §§ 1710, 1713 (1958); 73 Stat. 665, 12 U.S.C.A. § 1715w (Supp. 1959).

[68] NAT'L FEDERATION OF SETTLEMENTS AND NEIGHBORHOOD CENTERS, AMENDMENTS TO EXISTING RESOLUTIONS ADOPTED AT THE ANNUAL MEETING (Boston 1960).

[69] See note 22a *supra*.

fairness, however, it should be said that local public agencies generally treat individuals with the same care as families in those cases where there is a need for relocation services.

IV

BUSINESS RELOCATION

The foregoing paragraphs have dealt with the relocation of families and individuals from urban renewal project areas, intentionally omitting any extensive treatment of the problems faced by dislocated business firms. This is a different subject, with problems and opportunities of its own.

In the first ten years of urban renewal, the dislocation of business has been substantial, but hardly massive. By the end of June 1959, a total of 11,251 nonresidential establishments had been relocated (including churches, schools, and other institutions) and the annual rate of displacement was about 3,700 per year.[70] In the main, these establishments have included businesses and institutions which happened to find themselves in the midst of blighted residential areas. Their relocation was incidental to the objectives of urban renewal, in a sense that the relocation of families was not. There has been a growing trend, however, to provide governmental powers for the renewal of all types of urban obsolescence, including nonresidential areas as well as residential. Prior to 1959, several dozen urban renewal projects were undertaken in "skid row" areas, where the elimination of slum housing was secondary to the removal of nonresidential blight. The Housing Act of 1959 expanded this movement to major proportions by providing that twenty per cent of the federal urban renewal grants may be spent in purely nonresidential areas, regardless of whether new housing is to be created after the blight has been cleared away.[71] Localities are now able to initiate projects in which the relocation load will be almost totally composed of commercial and industrial establishments.

In the relocation of businesses, as in the relocation of families and individuals, a problem is created simply by the cost of moving to a new location. As with families, the federal law provides for relocation payments to cover moving expenses and unavoidable losses of personal property, and the maximum payment appears to be adequate to cover these items in a majority of cases. The maximum in the case of nonresidential establishments is $3,000, and the average payment made through the 1958-59 fiscal year was $1,041.55.[72] There is increasing evidence, however, that the average figure conceals a substantial minority of cases where the existing limit on relocation payments is grossly inadequate. Instances have been reported by urban renewal officials where the actual cost of relocating certain types of business firms (such as printing plants, which have large amounts of heavy equipment, or ware-

[70] Urban Renewal Administration statistics (unpublished).

[71] 73 Stat. 675, 42 U.S.C.A. § 1460 (Supp. 1959).

[72] Urban Renewal Administration statistics (unpublished). Of the total amount paid to businesses, 40% was accounted for by losses of property and 60% by moving costs.

houses, where the contents must be moved) may be as high as ten or more times the amount of the maximum federal payment.

The HHFA has recognized that the existing statutory limits on relocation payments may create hardships and has recommended legislation, as mentioned above,[73] to increase those limits substantially in communities where the cost of the payments can be shared by the local government in the same manner as other project costs. Similar proposals have heretofore received the endorsement of the Senate and of the Banking and Currency Committee of the House of Representatives[74]—indicating that some liberalization of the relocation payment language will be enacted in the near future. As in the case of families, however, the legislation cited would not affect the types of expenses for which payments may be made. The most important type of expense which is not covered by existing law is the loss of business or good will suffered by a firm as a result of relocation. There is not yet any general agreement that the Government should be responsible for this loss when property is acquired by public action, whether it be for urban renewal or some other purpose.

While the cost of moving to a new location affects almost all dislocated businesses, there is a far more serious problem confronting some—the question of survival. From the figures compiled by the URA and from other studies,[75] it appears that perhaps twenty per cent of the businesses occupying acquired property may fail to relocate successfully and go out of existence. The studies indicate that these are most likely to be marginal, small, retail establishments, or firms with special licensing or zoning requirements.

It is not surprising that the smallest firms are often the hardest hit by relocation.[76] This is probably because the small business has less capital with which to secure and prepare a new place of business (particularly if the displacee was a tenant), a lower credit rating, and less ability to pay the higher rents required for space outside of the slum. The small proprietary business is also more likely to be owned and operated by a businessman who is elderly, and unable to adapt to a new location. If a business not only is small, but also is engaged in retailing, it is especially vulnerable to dislocation. Many types of retailing require little specialized knowledge or skill, and success tends to depend on the customers who find the store's location convenient to their normal activities. The corner grocer or druggist, who relies almost entirely on a neighborhood clientele, may find that slum clearance disperses his customers over other parts of the city. In any case, he finds it a risky and discouraging business

[73] See note 53 *supra*.

[74] See S. 3670, § 403, 86th Cong., 2d Sess., passed by the Senate on July 16, 1960; and H.R. 12603, § 801, 86th Cong., 2d Sess., reported by the House Banking and Currency Committee on June 20, 1960.

[75] GREATER BOSTON ECONOMIC STUDY COMM., BUSINESS RELOCATION CAUSED BY THE BOSTON CENTRAL ARTERY table 4 (Boston, 1960); BALTIMORE URBAN RENEWAL AND HOUSING AGENCY, THE DISPLACEMENT OF SMALL BUSINESSES FOR A SLUM CLEARANCE AREA 2 (1959).

[76] GREATER BOSTON ECONOMIC STUDY COMM., *op. cit. supra* note 75, table 5A. It was found here that 100% of the firms with more than 100 employees survived, compared with 90% of those with 50 to 100 employees, and 73% of those with 2 to 5 employees.

to create a new clientele in an unfamiliar site.[77] If the small retail business has also been operating under a license, such as a liquor-dispensing license, or with a zoning exception or nonconforming use, he may find an additional obstacle in the way of a successful move.

In addition to the problems faced by business firms themselves, there is the possibility of loss to the economic position of the city as a whole when a nonresidential area is acquired and cleared. The stronger and more prosperous firms have greater ability to move and may leave the city, taking with them their tax-paying ability and employment.[78] This is more serious in a case where the cleared site is to be occupied by a public use, such as a highway, than in a case where private enterprise is expected to redevelop and occupy the land. In determining whether the new uses will represent a net economic gain, however, the loss of the previous occupants should be considered.

While the techniques of relocating business and other nonresidential establishments from urban renewal areas are still relatively new, several directions can be suggested in which solutions may lie. It has been pointed out earlier that the federal statute requires a relocation plan and, in effect, a relocation service for dislocated families, but not for dislocated individuals or businesses. Nevertheless, if relocation services are provided specifically for businesses, they are eligible as normal costs of an urban renewal project, and several cities, such as New Haven and Baltimore, have been providing expert assistance of this type. The problems faced by dislocated businesses are so complex—particularly for small businesses which are not normally accustomed to utilizing expert real estate and managerial advice—that the availability of expert advice appears to be essential to achieve successful relocation in any area where there are substantial numbers of business concerns.[79]

The Small Business Administration has for some time been working in cooperation with the URA in providing for assistance to small business concerns affected by urban renewal projects. SBA has issued instructions to its Regional Directors to appoint representatives for the purpose of maintaining liaison with local, state, and federal authorities connected with urban renewal. It is a function of these representatives to meet and counsel with the owners and managers of individual small

[77] GREATER BOSTON ECONOMIC STUDY COMM., *op. cit. supra* note 75, table 4. This study found that approximately 85% of the firms engaged in manufacturing, wholesaling, and service activities survived, compared to only 56% in retailing. The latter figure is probably high, since the study omitted some 300 businesses which had less than two employees. Among the retailers who survived, total employment declined in the year after relocation, indicating that it was difficult to carry on at some of the new locations.

[78] GREATER BOSTON ECONOMIC STUDY COMM., *op. cit. supra* note 75, tables 10, 13, *Summary of Findings*. The relocation caused by the Boston Central Artery cost the city 1,348 of the 7,160 jobs formerly provided by the displaced firms; 40% of this loss was attributable to migration. Although only two of the 455 displaced firms moved outside the metropolitan area, 35 moved to the suburbs beyond the city limits.

[79] GREATER BOSTON ECONOMIC STUDY COMM., *op. cit. supra* note 75, table 15D. Among the businesses relocated by the Boston Central Artery, where no such services were available, 52% of the relocated businessmen who were interviewed expressed a desire for help in understanding municipal regulations, and 58% in analyzing building, renting, and tax costs.

business concerns who may require technical and financial aid, and to inform them of the types of assistance available from SBA. These are: (1) technical and management advice; (2) special consideration in obtaining small business loans; and (3) occupational and vocational retraining for proprietors who fail to relocate, and their employees.[80]

There are other important ways in which the problems of dislocated businesses can be relieved. In New Haven, Connecticut, Providence, Rhode Island, and Washington, D.C.—to name only three—arrangements have been made for businesses that formerly occupied a project site to act as redevelopers, either separately or in the form of syndicates. The latter arrangement is especially adaptable for small firms, because project land is normally marketed in parcels too large for a small establishment to finance unaided. In New Haven, the city has taken the further step of providing a temporary site, on which a syndicate of small businesses can operate until its cleared slum site is ready for occupancy.[81] Several bills have been proposed in Congress in recent years which would require a local urban renewal agency to give a priority to dislocated businesses when disposing of cleared sites. HHFA has endorsed this objective, but opposed the adoption of a law to require it in every case, on grounds that it might interfere with a community's opportunity to plan the reuses of project land in terms of what is best for the city as a whole, and that land prices might suffer if such additional restrictions should discourage potential redevelopers who were not formerly located in the area.[82]

Other ways which have been suggested to ease the burden of relocated businesses —ways which would require the enactment of substantial new legislation—include the provision of liquidation payments for businessmen who fail to relocate (this could also take the form of a relocation payment for the loss of good will, limited to those who go out of business) and the creation of a federal guarantee of small business leases—much like an FHA guarantee of a home mortgage. The latter idea has been suggested by Planner Victor Gruen as a solution for the situation of small retailers who are displaced from an urban renewal site, only to see new retail stores go up in the redeveloped area, leased to outlets of large chain concerns. The reason that redevelopers turn to the chain stores, according to Gruen, is the high credit standing that is necessary to back up redevelopment financing. If the federal government provided a credit base for small businessmen, he reasons, they, too, could afford leases in new shopping centers and other commercial buildings.[83]

[80] For details, see letter from Philip McCallum, Administrator, Small Business Administration, to Albert Rains, Chairman, Subcommittee on Housing, House Committee on Banking and Currency, June 15, 1960; SMALL BUSINESS ADMINISTRATION, SBA SERVICES FOR COMMUUNITY ECONOMIC DEVELOPMENT (1960).

[81] *Relocation News*, 16 J. HOUSING 239 (1959).

[82] Statement of David M. Walker, Commissioner, Urban Renewal Administration, in *Hearings Before a Subcommittee of the House Committee on Banking and Currency on General Housing Legislation*, 86th Cong., 2d Sess. 90 (1960).

[83] Gruen, *Relocating Small Businesses in Large Shopping Centers: Why Isn't It Being Done?*, 16 J. HOUSING 237 (1959).

In conclusion, it should be emphasized that relocation is not necessarily a bad experience for business concerns. It provides an opportunity in disguise for some, by forcing them to give up timeworn and obsolete premises and methods. A good example is cited in the study of relocation experience connected with the acquisition of property for the Boston Central Artery. Thirty-six of the dislocated firms were meat-packing plants, and although six of them went out of business, the others found sites in a new area outside the central business district. The new area was apparently better suited for their type of operation, because three years after relocation, the remaining plants had doubled in total employment. All told, forty-seven per cent of the businessmen relocated from the path of the Boston Central Artery said afterward that they preferred their new location, compared with twenty-six per cent who preferred the old, and twenty-seven per cent who saw no difference. Thirty-four per cent reported an increase in business volume after relocation, and half of these gave the new location as the reason.[84]

V

THE HUMAN FACTOR

Up to this point, we have been discussing relocation primarily from the point of view of the relocator—the one who is concerned with getting the job done. Again and again, however, it has been clear that success depends in large measure on the attitude of the relocatee. We have seen that a large segment of low-income families in the relocation load will not accept public housing and that new housing built under section 221 will not be bought by relocatees unless it meets their needs and desires with respect to location, price, and design. The number of families who are relocated in standard housing of any kind depends to a degree on their willingness to accept the assistance offered by the local public body and to adjust to new living standards and new neighborhoods. Similarly, if dislocated businessmen are not willing to seek new opportunities and new methods, they may become casualties of the relocation process. The success of a relocation program for nonwhites, depends partly on the maturity and responsibility with which the situation is handled by the nonwhites themselves. In short, it behooves us to look at relocation for a moment through the eyes of the people involved. What are their attitudes toward relocation, and how will these attitudes affect the success of the urban renewal undertaking?

In the first place, a clear distinction should be (but often is not) made between the attitude of a relocatee at the time he is forced to move and his attitude some months or years later, when he may have realized the advantages of a new location and a decent, safe, and sanitary home. The short-term reaction is naturally negative. No one likes to be forced to leave his accustomed home and neighborhood, where he has made the difficult adjustment to his lot, and where more often than not he

[84] GREATER BOSTON ECONOMIC STUDY COMM., *op. cit. supra* note 75, notes for table 5, tables 15A, 15C.

has been able to associate with others who have the same customs and institutions, the same problems and tastes, and even, in many areas settled by foreign-born and first-generation Americans, the same language. In addition to the relocatee's normal reluctance to leave familiar surroundings, there are those who resist the change because of an innate suspicion of officialdom, or because they do not know that they can afford better housing in a better neighborhood, or because of fear that they will not be able to conform to the living standards of such a neighborhood. There are others who prefer the slum, with its anonymity and its opportunities for self-sufficiency, independence, and mobility.[85] Still others have achieved a respectable, middle-class life in the slums because of the opportunities for economy in family budgeting. They resent the label of "slum," and the implication that they need public assistance. Recent in-migrants from rural areas, on the other hand, are apt to prefer their rural habits of life and to resist suggestions that they should learn urban ways.[86]

While these attitudes explain the negative initial reaction of slum residents to the idea of relocation, they may also have a strong bearing on the long-term possibilities of eliminating slums and blight. Will the people who lived in the slum merely create new slums wherever they move? Or is it possible to "rehabilitate the people" by relocating them in decent, safe, and sanitary housing? Undoubtedly, the answer is "yes" and "no" to both questions; some people will be transformed by the process, and others will not. A revealing analysis of the residents of a redevelopment area was made in Indianapolis, Indiana, in 1955. The residents were classified according to their reasons for living in the area, and the result showed that some are permanently confined to the slum by necessity (social outcasts, the indolent, the "adjusted poor"), while others are there only by temporary necessity (the "respectable poor," the trapped). Some, on the other hand, are permanent slum residents as a matter of choice (fugitives, those who are addicted to antisocial habits) while still others choose to live there temporarily because of the savings that are possible (young families, beginning entrepreneurs).[87]

This analysis suggests strongly that anyone who is responsible for a relocation program should first understand the functions that have been performed by the slum that is to be wiped out. It is well known that the slum harbors antisocial elements who will create problems whether the physical structures are cleared or not. It is not so often recognized that the slum represents a way of life that is quite different from that of middle-class neighborhoods. Professor Herbert Gans, reporting on ten months that he spent in a Boston slum-clearance area, points out some of the differences: the lack of emphasis in the slum on privacy and on status symbols

[85] This is exemplified by the prevalence of weekly rents in slum areas, as opposed to monthly rents and contractual leases in "better" neighborhoods.

[86] Considerable light has been shed on the attitudes by several sources. See Gans, *supra* note 1; PHILADELPHIA HOUSING ASS'N, *op. cit supra* note 30; Citrine & Moore, *Redevelopment and the Social Worker*, 14 J. HOUSING 330 (1957).

[87] COMMUNITY SURVEYS, INC., REDEVELOPMENT: SOME HUMAN GAINS AND LOSSES 48 (1956). This study should be required reading for urban renewal administrators generally, and for relocation specialists specifically.

connected with exterior appearances; the social grouping around kinship and ethnic connections, instead of the self-sufficient single-family unit of the middle-class area.[88] The midde-class citizen (which includes most planners and urban renewal administrators) may feel that residents of the slum would prefer to be able to follow middle-class ways, but this may be far from the truth. John Seeley, one of the authors of the Indianapolis study, makes this point in an account of life in the slum:[89]

> I would have to say, for what it is worth, that no society I have lived in before or since, seemed to me to present to so many of its members so many possibilities and actualities of fulfillment of a number at least of basic human demands: for an outlet for aggressiveness, for adventure, for a sense of effectiveness, for deep feelings of belonging without undue sacrifice of uniqueness or identity, for sex satisfaction, for strong if not fierce loyalties, for a sense of independence from the pervasive, omnicompetent, omniscient authority-in-general, which at that time still overwhelmed the middle-class child to a greater degree than it now does. These things had their prices, of course—not all values can be simultaneously maximized. But few of the inhabitants whom I reciprocally took 'slumming' into middle-class life understood it, or, where they did, were at all envious of it. And, be it asserted, this was not a matter of 'ignorance' or incapacity to 'appreciate finer things.' It was merely an inability to see one moderately coherent and sense-making satisfaction-system which they didn't know, as preferable to the quite coherent and sense-making satisfaction-system they did know.

Finally, the slum shelters a major portion of the social problems of the city, ranging from juvenile delinquency, alcoholism, and narcotic-addiction to imbecility, insanity, promiscuity, separation, desertion, and divorce. Of the 1,400 families who were the last to be relocated from the District of Columbia Area C redevelopment project, thirty per cent were broken families with children; twenty-five per cent reported illness that affected earnings; forty-eight per cent had suffered unemployment within the last two years; and thirty-eight per cent had been on the public assistance rolls at one time or another.[90] Relocation has a twin-edged effect on such families. On one hand, the stress of being uprooted may complete the disintegration of a family that has been precariously close to breaking up, or aggravate any other problem that already troubled a family. On the plus side, however, the process of relocation can bring to light problems that might otherwise have been suffered in silence by families who are ignorant of the forms of assistance available to them. Indeed, a 100 per cent relocation effort could, ideally, identify almost all of the social and educational problems in a specific area and provide the opportunity for bringing expert attention to bear on them.

Can the expert attention be provided? Are the social resources of the community tooled up for the task? This does not now appear to be the case in many cities. The problem families who are displaced from slum-clearance areas have specific needs for: (1) information on what social services are available to them; (2) a central

[88] Gans, *supra* note 1, at 15, 17-18.

[89] Seeley, *The Slum: Its Nature, Use, and Users*, 25 J. AM. INST. OF PLANNERS 10 (1959).

[90] These statistics, supplied by the Redevelopment Land Agency, District of Columbia, were developed as part of a Demonstration Project being conducted in the District of Columbia with the assistance of a grant from the Urban Renewal Administration.

referral point, where they can obtain access to all types of social services; (3) assistance with groupings of problems which are not separable, but interlocking, both within families and between families; (4) the immediate availability of the appropriate social services, without long waiting lists or qualification periods; (5) education in home management, nutrition, health and hygiene, maternity and child care; and (6) advice and guidance in home financing, budgeting, and contracting. These needs are accentuated in a relocation situation, because at that time, the normal sources of help in the area are drying up. The citizen leaders of the neighborhood are likely to be the best able to move, and, therefore, the first to go; settlement houses and churches are being relocated themselves, usually ahead of the hard core of problem families; there is a vague, but very real, lack of interest shown by the community generally in a neighborhood that is disappearing—that has no future.

This puts the task on the doorstep of community-wide social agencies—both public and private. Normally, such agencies do not have a centralized referral system, so that one visit will lead a client quickly to the proper source of help. Also, each social agency may deal with only one aspect of family life; and so there is little experience or motivation for coping with combinations of interlocking problems.[91] Finally, the social agencies are not as a rule equipped to solve family problems on an area, or saturation, basis. The normal sources of the case load are complaints, referrals, and walk-ins.

VI

IMPLICATIONS

A. For Planning

As the urban renewal movement has prospered and grown, gathering support and momentum from a broad spectrum of interests, including downtown businessmen, civic leaders, and even suburban taxpayers, the pendulum has swung away from the housing orientation of the 1949 Act and toward a concept of "city rebuilding," or of the renewal of obsolete land uses generally. Among the forces that create an urban renewal project, economic motivations have become more and more important: the need for additional tax revenues to relieve the crisis of municipal finance; the desire to attract middle and upper-class families back to the city; the incentive of preserving old real estate investments and creating opportunities for new ones; and the urge, sometimes born in desperation, to create a *tour de force* of open space and architecture that will spark a "revival" of the central city. In relation to these motivating factors, relocation becomes simply a tool of land clearance, subordinated to the primary objective of redevelopment.

At the same time, however, there has been a growing awareness of the social problems that are uncovered by relocation and of the further complications that relocation sometimes adds to such problems. In most cases, the process of slum clearance and redevelopment has but a negative connection with low-income housing

[91] *Cf.* PHILADELPHIA HOUSING ASS'N, *op. cit. supra* note 30, at 31-32.

—the elimination of unsafe and unsanitary dwelling units. The only way in which slum clearance has directly assisted in the improvement of housing conditions for slum dwellers has been through the relocation process; and here is where the attention of those whose motivation is social, rather than economic, is beginning to focus. While the economic motivation is no less worthwhile, it becomes important to recognize that the two basic motives—economic and social—may be present in any given project, and they may come into conflict with each other.

On another level, there is a potential conflict between (1) the objectives of planners who are educated to lead the community toward a middle-class ideal, and (2) the wishes of the residents of slum and blighted areas, who may want to continue their traditional customs. The potential contrast between these standards has been described above. In practice, this may become a problem not only in carrying out a relocation plan, but also in the selection of project areas in the first instance. The planner who determines the eligibility of an area for redevelopment must be extremely cautious not to confuse the condition of structures and facilities with the habits of slum dwellers. Housing sometimes appears obsolete only so long as it is inhabited by members of a lower social class, as amply demonstrated in the Georgetown and Capitol Hill sections of Washington, on Baltimore's Tyson Street, and in sections of Greenwich Village and Chelsea in New York City.

These potential conflicts are sure to be recognized more widely as the scope of the urban renewal program grows and as the cities' renewal activities progress beyond the obvious opportunity areas into the "grey belt," where objectives are not so easily identified. Increasing numbers of urban renewal planners and administrators are becoming concerned about the question of objectives and are seeking means of identifying goals that can be understood and endorsed by the community as a whole.[92] From the point of view of relocation, this requires a search for planning solutions that will reconcile economic motives with social concerns and provide the relocated slum dweller with new facilities for the satisfaction of his needs and desires. Up to now, our preparation for this job has probably been inadequate, and very few communities have thought of relocation in qualitative, as well as quantitative, terms. But the slum, as we have seen, performs functions that are very real—not the least of them being the provision of cheap housing for those who need it and are unable, or unwilling, to resort to public housing in its present form. Many of these people can take very good care of themselves once they are shown how, as demonstrated by the experience of the Fight Blight Fund in Baltimore.[93] Others need help with

[92] "The End Product of Urban Renewal" was the theme, and the search for objectives the topic of greatest interest, at the annual Working Conference of the National Association of Housing and Redevelopment Officials, held at the Institute of Government, University of North Carolina, Chapel Hill, N. C., in March 1960.

[93] Slum home owners are referred to the Fight Blight Fund if they have no apparent financial resources with which to make the housing improvements required by code enforcement. Experience with more than 300 such cases has shown that more than 80% actually needed legal and financial advice, rather than money. See MARTIN MILLSPAUGH & GURNEY BRECKENFELD, THE HUMAN SIDE OF URBAN RENEWAL ch. 1 (1960).

serious social or emotional problems before they can enjoy a satisfactory life away from the palliative conditions that are peculiar to the slum. These factors suggest that a community will have little long-term success with the business of eliminating slums and blight unless relocation is given the status of a positive program, based on the specific needs and desires of the relocatees, and geared to the rehabilitation of problem families and others who need help.

The first step in creating such a program would be identification of the size of the relocation load that will be created by urban renewal and similar activities, together with the predominant characteristics of the people involved. Thus identified, the total need can be measured against the community's potential relocation resources, and a program developed to meet deficiencies in the community's current and future ability to supply both relocation housing and the necessary rehabilitative services for human problems. A major part of this analysis can be assisted with federal funds under the provision in the Housing Act of 1959 for grants to assist communities in the preparation of total community renewal programs.[94] Relocation is an essential element of such a program, and relocation planning should play an essential part in the selection and scheduling of specific projects.

The next step is the detailed planning of those projects, and here a thorough understanding of the people who live in the slum becomes increasingly important. Almost every one of them will dislike the prospect of being relocated, but it is now clear that the process can be an important opportunity for many.[95] In project planning, it will be important to distinguish between those who will be helped by relocation and those who may be hurt, and to provide for each category to be treated accordingly. This requires a face-to-face acquaintance with the residents of the project area, and a thorough knowledge of their problems, their resources, and their aspirations. It makes very little difference, apparently, whether the project involves clearance, conservation, or rehabilitation. In any of the three, the solution of a family's housing problem will often require the prior solution of a serious social, financial, or legal problem.

B. For Operations

The need to plan for the total impact of relocation has been mentioned above. Obviously, such planning cannot be restricted to the relocation load that will result from urban renewal, because urban renewal relocatees will be competing in the housing market with those who are relocated by other public and private development programs. Similarly, it appears logical for the organization of a relocation program to focus responsibility for all relocation operations in the community at one central point. This may or may not mean a central relocation agency, as recom-

[94] See note 21 *supra*.

[95] See THOMPSON, *op. cit. supra* note 42; Citrine & Moore, *supra* note 86. Thompson indicates the advantages of relocation to minority families who never before had access to mortgage financing or to expert assistance in finding a home. Citrine and Moore, in their article on Portland, Maine, indicate that relocation can provide the younger generation with a route of escape—from a life situation that is dominated by an older generation with different standards and customs.

mended by NAHRO in 1959.[96] Nevertheless, the advantages of a central relocation agency (it provides a trained staff in continuous operation, maintains a single listing service of available rehousing units, eliminates competition for those units, and tends to prevent the subordination of relocation to redevelopment—putting the emphasis on thoroughness rather than speed) appear to outweigh the disadvantages (it creates difficulties in coordinating relocation with site acquisition, management, and demolition). In addition to a central relocation responsibility, it can be recommended that there be a central record-keeping system, to record experience and results; that citizen advisory committees should be set up on the community level and also the neighborhood level; and that the relocation staff should establish permanent relationships with courts, social agencies, neighborhood councils, churches, and the press.[97]

The selection of the relocation staff itself is of paramount importance—second only to the matter of housing supply.[98] In many ways, the characteristics of a good relocation specialist are the same as those required for any form of counseling. But there is more to it than that, because a good relocation specialist must be able to produce treatment as well as diagnosis. One southern city has compiled an excellent relocation record with a team of two: a social worker, who is able to determine what sort of help a displaced family needs, and a politician (formerly the local sheriff), who knows how to get it. A good relocation specialist may come from almost any walk of life; the essential element is the attitude with which he approaches the cases presented to him.[99]

After staff selection (and training), it is essential to establish communication between the staff and the residents of the project area—starting with the beginning of the planning stage or even earlier. The Demonstration Project conducted by the District of Columbia Redevelopment Land Agency has shown the need for a maximum exposure of project area residents to the facts about relocation—well before any moving actually begins. The method adopted in this case was to hold a series of orientation courses for residents, covering (1) the nature of the city's program as a whole, (2) finding a new home, (3) living in a new neighborhood, and (4) community resources and citizenship. In Pittsburgh, the same objective is achieved by holding block meetings for future relocatees, where relocation officials and neighborhood representatives explain what is going to happen and answer questions about the assistance that will be provided. After contact has been established, communications between relocators and relocatees can be maintained by providing a relocation office in the project area, with office hours on evenings and weekends, and by keeping contact with every family that moves, whether it is moved with the assistance of the relocation staff or not.

[96] NAT'L ASS'N OF HOUSING AND REDEVELOPMENT OFFICIALS, *op. cit. supra* note 24, at 4.

[97] *Cf.* Meltzer & Orloff, *supra* note 11.

[98] This is the unanimous conclusion of members of the Relocation Branch of the Urban Renewal Administration, who have inspected scores of relocation programs operating under a variety of conditions in all parts of the country.

[99] *Ibid.*

Finally, the prevalence of social problems in a project area and the aggravation of those problems by the relocation process indicate the need for close coordination between social work and relocation operations—including, perhaps, the presence of some social work technicians on the relocation staff. The burden of social work will probably have to be handled by the social agencies, however, and a list of the rules that should be followed, in the light of experience with relocation to date, might go as follows:

1. Anticipate and plan for the total relocation load.
2. Establish a central focus of responsibility for all social agency services.
3. Establish a simple, speedy means of referral between agencies, with a staff member in each agency designated to give special priority to relocation cases.
4. Prepare and distribute in urban renewal areas complete information on the social services that are available, and how to obtain them.
5. Provide coordination between agencies, to permit simultaneous treatment of whole families, rather than isolated treatment of separate problems.
6. Provide follow-up services after a family has been relocated in a new neighborhood, to help with adjustment problems.
7. Organize educational and technical advisory services where they are lacking.

VII

OPPORTUNITY

It is hoped that enough has been said in the foregoing pages to indicate why it is possible to view relocation as an opportunity, rather than as an unpleasant duty. For the first time, it is possible to identify the needs and problems of a city's less fortunate families on a concentrated area basis and to diagnose and treat those problems in a systematic fashion. Many of the problems will defy solution—they are as old as the human race—but there is reason to expect that enough can be accomplished, in the form of raised aspirations and improved standards of living, to make a positive relocation program one of the most important and rewarding elements of the community development process.

This does not stop with the solution of social problems or the rescue of problem families. It should also be possible, when such a program is in operation, to provide facilities for education in urban living on a saturation basis—in the areas where in-migrating families make their first home in the city. The importance of this opportunity does not have to be emphasized when it is realized that central cities are experiencing a steady stream of in-migration and every family educated or otherwise assisted out of the slum is immediately replaced by another family with little or no competence for urban living.

Finally, the task of relocation is inextricably involved with even broader community problems, which also arise from population movements. The need for stabilizing racially-changing neighborhoods, the exclusion of nonwhites from suburbia,

and their growing dominance in the central cities—these are matters that can be laid bare for inspection and constructive action under pressure from the need to relocate thousands of families from the path of urban progress. When the community has been brought face to face with these problems of its own creation, and not until then, a start will be made on the road to finding solutions.

This is not to say that relocation can become a program to settle every frailty that urban man is heir to. But it can provide some magnificent opportunities for service and accomplishment. The "do-gooders," who have social responsibilities as their primary motivation, are also reluctant to stand in the way of progress. The "operators," who want to get the redevelopment job done, are at the same time anxious that no one should be hurt unnecessarily. Both groups should be able to do their work more effectively if the social program (relocation) is distinguished from the economic program (redevelopment) and given equal status in the spectrum of community development activities. This should remove some of the veil of confusion that now hampers the search for community objectives and help a community make the decisions, both economic and social, that are necessary to a successful urban renewal program.

LEASING IN THE DISPOSITION OF URBAN RENEWAL LAND

LYMAN BROWNFIELD* AND MARIAN S. ROSEN†

Leasing urban renewal project land is authorized by the Housing Act in the simplest terms.[1] The early legislative history of this authorization relates to the slum-clearance genesis of urban renewal and is pertinent to contemporary problems of interpretation principally because it shows how the inappropriateness of leasing as a general tool in a broadened urban renewal program was anticipated even before the program was under way in its limited slum clearance stage.[2] Subsequent legislative history has been negative in character. While urban renewal has made its tremendous statutory and administrative evolution from a social welfare experiment to the basic tool for reshaping American cities to survive extensive social and technological changes, the only changes which Congress has made in connection with leasing are technical ones. They were inspired by the suggestion of bond counsel apropos of the one urban renewal lease which has been completed through the financing stage.[3] The brevity of the statute and the limited legislative history necessi-

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[1] Section 105(b) of the Housing Act of 1949, as amended, provides as follows: "(b) When real property acquired or held by the local public agency in connection with the project is sold or leased, the purchaser or lessees and their assignees shall be obligated . . . ." 63 Stat. 416, as amended, 70 Stat. 1097 (1956), 42 U.S.C. § 1455(b) (1958).

Section 110 of the Housing Act of 1949, as amended, which relates to "Definitions," provides, in subsection (c)(4): "(4) disposition of any property acquired in the urban renewal area (including sale, initial leasing or retention by the local public agency itself) at its fair value for uses in accordance with the urban renewal plan . . . ." 63 Stat. 420, as amended, 71 Stat. 300 (1957), 42 U.S.C. § 1460(c)(4) (1958).

[2] See Foard & Fefferman, *Federal Urban Renewal Legislation*, 25 LAW & CONTEMP. PROB. 635 (1960).

[3] Section 102(a) of the Housing Act of 1949, as amended by § 402(a) of the Housing Act of 1959, substituted the term "for such purposes" in lieu of "as part of the gross project cost." 63 Stat. 414, as amended, 73 Stat. 654 (1959), 42 U.S.C. § 1452(a) (Supp. I, 1959).

The appropriate sentence of the statutes relating to temporary and definitive loans, § 102(a), Housing Act of 1949, as amended, presently reads: ". . . Such loans (outstanding at any one time) shall be in such amounts not exceeding the estimated expenditures to be made by the local public agency *for such purposes*, bear interest at such rate (not less than the applicable going Federal rate), be secured in such manner and be repaid in such period (not exceeding, in the case of definitive loans, forty years from the date of the bonds or other obligations evidencing such loans), as may be deemed advisable by the Administrator." (Emphasis added.) 63 Stat. 414, as amended, 73 Stat. 654 (1959), 42 U.S.C. § 1452(a) (Supp. I, 1959).

Section 102(c) of the Housing Act of 1949, as amended by § 402(b) of the Housing Act of 1959, added "the principal of and the interest on," and this section presently provides:

"(c) Loans made pursuant to subsection (a) or (b) hereof may be made subject to the condition that, if at any time or times or for any period or periods during the life of the loan contract the local public agency can obtain loan funds from sources other than the Federal Government at interest rates lower than

tate a determination of congressional intent by inferences which involve rather practical considerations.

Section 105(a)[4] directs that the act be administered to "afford maximum opportunity . . . for the rehabilitation or redevelopment of the urban area by private enterprise." Since municipal ownership of the redevelopment area does not afford private enterprise as much opportunity for participation in the redevelopment as does private ownership, adoption of municipal ownership as a goal, rather than a sometimes necessary incident of urban renewal, is contrary to the expressed intent of the act.

I

CATEGORIES OF LEASES

In the disposition of urban renewal project land, leases can be generally categorized in three main groups: (1) the "lease-purchase," in which provision is made for transfer of title to the lessee at the end of the lease term; (2) the lease with option to purchase; and (3) the straight-term lease.

A. Lease-Purchase

The first type of lease, although couched in language which is commonly used in a lease, has the same effect as an installment sale. Title is transferred at the termination of the "lease" term, without the necessity of payments other than those already paid as rent. The sum total of the rental payments equals the amount it would take to pay off a mortgage for the full purchase price at the going interest rate. The equivalent of a prepayment clause in a mortgage is provided by an option for the lessee to prepay the rental at a discount and take title prior to the lease termination date.

Title I spells out neither a prohibition against installment sales nor a requirement that sales be made only for cash. However, from statutory provisions relating to the types of land disposition,[5] ascertainment of net project costs,[6] and definitive

provided in the loan contract, it may do so with the consent of the Administrator at such times and for such periods without waiving or surrendering any rights to loan funds under the contract for the remainder of the life of such contract, and, in any case, the Administrator is authorized to consent to a pledge by the local public agency of the loan contract, and any or all of its rights thereunder, as security for the repayment *of the principal of and the interest on* the loan funds so obtained from other sources." (Emphasis added.) 63 Stat. 414, as amended, 73 Stat. 654, 42 U.S.C. § 1452(c) (Supp. I, 1959).

A definitive loan was made in connection with a lease from the Redevelopment Authority of Pittsburgh to the Public Auditorium Authority of Pittsburgh in the Lower Hill Project, U.R. Pa. 7-1, Pittsburgh, Pa. The definitive loan was completed on Dec. 9, 1958, prior to the legislative changes noted above, which were approved by Congress on Sept. 23, 1959.

[4] Section 105(a) of the Housing Act of 1949, as amended, provides that:

"(a) The urban renewal plan for the urban renewal area be approved by the governing body of the locality in which the project is situated, and that such approval include findings by the governing body that . . . (ii) the urban renewal plan will afford maximum opportunity, consistent with the sound needs of the locality as a whole, for the rehabilitation or redevelopment of the urban renewal area by private enterprise . . . ." 63 Stat. 416, as amended, 70 Stat. 1097 (1956), 42 U.S.C. § 1455(a) (1958).

[5] See note 1 *supra*.

[6] Provision is made for net project costs in § 110(f) of the Housing Act of 1949, as amended:

"(f) 'Net project cost' shall mean the difference between the gross project cost and the aggregate

loans,[7] the Urban Renewal Administration (URA) has inferred that the account between a local public agency (LPA) and URA cannot be settled and closed out unless the sales proceeds have been received from the purchaser in cash or, in the case of lease, from the proceeds of a definitive loan. As a consequence, installment sales have not been permitted.[8]

If this rule were applied consistently, the federal government would be denied participation in any receipts generated by an LPA after the account had been settled. Among the things whose infinite variety time seems not to wither are the commercial transactions of free men; and it is beginning to be apparent that the broad range of redevelopment endeavor will produce situations in which any such rule would be ill advised.[9]

The legal necessity, as well as the administrative advisability, of an unqualified prohibition against installment sales seems questionable. A project involving leased property is closed out[10] only with funds loaned or guaranteed by the federal government, the loan to be repaid from lease proceeds. No discernible legal or practical purpose is served by making a loan to *A*, with the understanding that the loan is to be repaid by *B*, in order to avoid having *B* owe the money in the first place. Subject, of course, to proper administrative regulation, the installment sale should be recognized as one of the disposition techniques available for urban redevelopment. The lease-purchase, which exists only as an ersatz installment sale, would then no longer have a reason to exist.

B. Lease with Option to Purchase

The lease with an option to purchase, like the lease-purchase, is primarily a financing device. Institutions loaning on leaseholds have a strong preference for an option either for perpetual renewal or for purchase. The Federal Housing Administration (FHA) unqualifiedly requires an option to purchase running to it in the event of default by the mortgagor-lessee. The rental is usually an expression of the capital value of the fee simple in terms of an annual percentage—which probably is a little higher than the rate for good first mortgages (because it is determined in an atmosphere of enterprising rather than lending) and lower than the rate for second

of (1) the total sales prices of all land or other property sold, and (2) the total capital values (i) imputed, on a basis approved by the Administrator, to all land or other property leased . . . ." 63 Stat. 420, as amended, 71 Stat. 300, 42 U.S.C. § 1460(f) (1958).

[7] Section 102(a) of the Housing Act of 1949, as amended, 63 Stat. 414, 70 Stat. 1097 (1956), 42 U.S.C. § 1452(a) (1958).

[8] Information from URA indicates that there have not been any installment sales of project land.

[9] For example, a redeveloper offered to purchase land from an LPA and in addition to payment of the purchase price at time of transfer, the redeveloper would later make additional payments. The additional payments to the LPA subsequent to the project being closed out would be in the nature of gratuitous payments and, therefore, it would seem that the federal government would not, in effect, be entitled to receive any of the proceeds from such additional payments. Of course, the URA did not approve such a transaction.

[10] See note 3 *supra*. To date, the only completed definitive loan transaction is in connection with the lease in the Lower Hill Project, U.R. Pa. 7-1, Pittsburgh, Pa. This project has not been closed out because some project land has not been disposed of.

mortgages (because, in fact, the lease with an option is a security device senior to the "first" mortgage).

When parties have negotiated an option figure reasonably related to the value of the land, it would evidence a rare circumstance or a sadly deflated project if the option were not ultimately exercised. The financing provided by so deferring actual purchase is one hundred per cent of the price of the land. However, whatever may be the advantages of this financing to the redeveloper, they are not without offsetting disadvantages. A conventional loan will not include the land value in the mortgage base, so that the investment saving of the redeveloper is reduced by that portion of the land value on which he could borrow if he owned the land. Further, the lender who realizes that he may have to redeem the fee simple in self-protection may deduct the rest of the land-cost from the loan as insurance against such an eventuality. An FHA loan is computed by deducting the value of the fee interest in the land alone from the *mortgage* amount (not the appraised value) which would be insured on the improved fee. In FHA cases, this method of computation will always precisely offset any financing advantage from leasing, except in cases where the value of the unimproved land is so high in relation to the maximum FHA insurable mortgage that it over-offsets the advantage.[11]

Notwithstanding all this, there is still a substantial demand among redevelopers for leases with options. This proves at least that there is no limit to human ingenuity, and no doubt there will always be some constructive use for such leases. On the whole, however, it cannot yet be determined how closely the demand for such leases equates with the good of the program, and how much the demand is related simply to the versatility of such leases as vehicles for speculation in urban renewal.

The lease with option presents an obvious means to obtain a short-term option in circumvention of the existing rule against options. If options were permitted, as such, there would no doubt be fewer demands to accompany the option with lease provisions. On the other hand, the lease portion carries with it settled rights which may permit more development work pending exercise of the option than would an installment contract or pure option—particularly since unexpected events might prevent the exercise of the option for a considerable period of time after redevelopment had begun.

Even when an option in a lease is intended for early exercise, an LPA would be imprudent if it did not plan definitive financing when it makes such a lease. If there is good reason to expect early exercise of the option, the definitive financing should be postponed and the lease carried by temporary financing until the option has either been exercised or its exercise postponed for a period of time sufficient to support marketing of the loan.

[11] Assuming that the maximum insurable mortgage amount in case of fee ownership is $1,000,000, and the capitalized ground rent is $100,000, the total maximum insurable mortgage amount which the FHA will loan on a leasehold is $900,000. However, if the property were owned in fee, the FHA would loan the total maximum insurable mortgage amount of $1,000,000.

C. Straight Lease

The third type of lease is just that and no more. It is not accompanied by an option either for purchase or perpetual renewal. Fundamentally and philosophically it differs from the other two types of leases wherein the lease provisions merely assist in accomplishing the principal purpose of transferring title. The straight lease provides for reversion of the improvements to the local authority, generally without cost, as well as retention of the fee interest. Leasing has been urged as one of the major tools of urban renewal.[12] An obvious by-product of straight leasing is permanent municipal ownership of the urban real estate involved. Equally obviously, therefore, this inevitable incident of leasing was not intended to prevent leasing in an appropriate case. However, advocates of straight leasing recognize municipal ownership not as a by-product, but as a goal.[13] They claim that it eases the administration of controls and regulations and the enforcement of municipal ordinances, eliminates the difficulties attending future reassembly of the same property, and preserves for the public instead of private individuals the benefit from appreciation in property values.[14]

To the extent that these reasons are valid, their application is not limited to urban renewal real estate. If these considerations are controlling, or if they constitute a public purpose sufficient to support drastic interference by public power and resources with the ownership of private property, one of the big surprises in the urban renewal package might well be a return to feudal land tenure.

Several articles which advocate downtown municipal ownership of real estate have appeared in the *Journal of Housing*.[15] A comment in the *Yale Law Journal* which strongly advocates widespread leasing of urban renewal land frankly acknowledges that such a program would eventually lead to municipal ownership of land from the proceeds of federal subsidies. Among the examples cited as evidence of the soundness of municipal ownership is the system of land tenure in several European cities, including some in Great Britain.[16] The philosophical foundation of at least some of these references is clear; the British studies relied on there bear the stamp of Fabian socialism.[17]

On a case-by-case basis, it must be recognized that there are situations where the advisability of leasing as opposed to sale is so strong as to amount to necessity.

[12] See Comment, *Long-Term Leasing in Urban Renewal: An Alternative Method of Municipal Land Disposition*, 68 YALE L. J. 1424 (1958); Raymond, *Successful Rehabilitation Calls for New Approach: Continuous Renewal*, 17 J. HOUSING 135 (1960); see also comments by John R. Searles, Jr., Executive Director, District of Columbia Redevelopment Land Agency, in Searles, *Continuous Renewal: Here is What Others Say About It*, 17 J. HOUSING 191 (1960); see also statements made by Lawrence M. Cox, Executive Director, Norfolk Redevelopment and Housing Authority, Norfolk, Va., in an address to the American Society of Planning Officials at its 1960 Convention in Miami Beach, Fla., May 22, 1960.

[13] See Raymond, *supra* note 12; Cox, *supra* note 12.

[14] See Comment, *Long-Term Leasing in Urban Renewal: An Alternative Method of Municipal Land Disposition*, 68 YALE L. J. 1424 (1958).

[15] See Raymond, *supra* note 12; Searles, *supra* note 12.

[16] See Comment, *Long-Term Leasing in Urban Renewal: An Alternative Method of Municipal Land Disposition*, 68 YALE L. J. 1424 (1958).

[17] *Id.* at 1426.

For example, continued government ownership of key waterfront property was recognized as being of such importance that Congress authorized the transfer of certain government property to the District of Columbia Redevelopment Land Agency for leasing only.[18] However, such cases are justified by unique factual situations rather than the application of doctrines favoring leasing as an instrument to effect municipal ownership of urban real estate.

Notwithstanding the occasional emergence on the local scene of dominant socialist governments, no political party or leader has ever suggested seriously to the local electorate a program for using public funds to acquire urban real estate in order that controls, regulations, and ordinances might be administered as a landlord rather than as a governing body, in order that problems attending possible future assembling of property might be anticipated, and in order to make a profit for the governmental unit from the appreciation of the property so acquired. Those who seriously advocate such a program now in the name of urban renewal are able to do so without presenting it to any electorate because of the several federal subsidies built into the leasing process.

First of all, the LPA, in effect, buys the property with the proceeds of a loan either made by the federal government or, if the loan is obtained in the private investment field, guaranteed by the federal government. The interest rate of the private loan is low because the federal government guarantees the lender both his principal and his interest.[19] It is low also because the proceeds to the lender are exempt from federal taxation.[20] The LPA then leases the property at a rate which is set in the marketplace by lessors who, among other things, pay income taxes. On the other hand, the proceeds of the lease when received by the LPA are not subject to income taxation. There has not been, and will not likely be, a time when the differential between the interest paid by the LPA and the tax-free rents received by it will not pay off the definitive loan in a period of time considerably shorter than its maximum term. As the result of the three separate federal contributions to the leasing process, the local political entity can acquire leased urban renewal land without substantial, if any, cost to itself.

The power of government to superimpose upon private ownership very considerable controls over the use and condition of land has been increasingly recognized. The principal, if not the only, justification for government interposition in the chain of title of urban renewal real estate is the need to use the power of eminent domain. Weighing such factors as the language in the Housing Act, which makes repeated references to development by private enterprise, it seems obvious that Congress assumed this interposition would be of short duration and did not intend the urban renewal program to foster municipal ownership of downtown and other urban renewal real estate. The lease should be used only when urban renewal land cannot be disposed of by sale.

[18] Act of Sept. 8, 1960, 74 Stat. 871.
[19] 63 Stat. 414 (1949), 70 Stat. 1097 (1956), 42 U.S.C. § 1452(c) (1958).
[20] 63 Stat. 414 (1949), 70 Stat. 1097 (1956), 42 U.S.C. § 1452(g) (1958).

The urban renewal plan was conceived as the appropriate method of making provisions for controls and restrictions, which would then be enforced by the appropriate governmental body. The assumption is that controls and restrictions, as well as local building codes, zoning ordinances, and so forth, can be effectively administered and enforced. If, as the leasing advocates urge either implicitly or explicitly, local authorities can exercise necessary control only through municipal ownership, then of what benefit is the urban renewal plan, or, as a matter of fact, the whole urban renewal program, except to the extent it involves leasing? The logical inference of this line of reasoning would be that the concept of urban renewal can only succeed by complete public ownership of urban real estate.

It has been suggested that leasing will result in a greater return to the urban renewal disposition program by creating imputed capital values greater than the amount which would be received on outright sale. As a general principle, it does not seem reasonable that a man will pay, for example, eight per cent to rent something which he could buy with money borrowed at six per cent. This is an area in which facts may perhaps lend themselves to as many interpretations as there are interpreters, but our examination of available evidence indicates that the redevelopers tend to stay within the appraised value, whether the transaction is a lease or a sale, and, when they exceed the appraisal, this is not caused by the availability of the property by lease rather than by deed.

In connection with the subject of controls, it is our judgment that the program is already suffering from too many, not too few, controls. Instead of thinking in terms of expanding the scope and basis of municipal controls in the urban renewal program, it might be well to consider reducing, if not eliminating, many of the control standards which are imposed in addition to those set forth in the zoning, housing, and building codes.[21]

II

ARRANGEMENTS FOR FINANCING

Closing out an urban renewal project involves a division of the net project cost between federal and local governments.[22] In ascertaining the net cost, the proceeds from land sales are subtracted from gross project cost.[23] When project land is retained by the LPA and leased, there are no sales proceeds to deduct. Instead, a capital value is "imputed"[24] to the land, and in order to close out the project account,

[21] See Brownfield, *Disposition of Urban Renewal Project Lands*, 25 LAW & CONTEMP. PROB. 732 (1960).

[22] 63 Stat. 416 (1949), 73 Stat. 672, 42 U.S.C. § 1453(a) (Supp. I, 1959).

[23] Section 110(f) of the Housing Act of 1949, as amended, provides as follows:

"(f) 'Net project cost' shall mean the difference between the gross project cost and the aggregate of (1) the total sales prices of all land or other property sold . . . ." 63 Stat. 420, as amended, 71 Stat. 300 (1957), 42 U.S.C. § 1460 (f) (1958).

[24] Section 110(f) of the Housing Act of 1949, as amended, further provides for a deduction of ". . . (2) the total capital values (i) imputed on a basis approved by the Administrator, to all land or other property leased . . ." from the gross project cost. 63 Stat. 420, as amended, 71 Stat. 300 (1957), 42 U.S.C. § 1460(f) (1958).

the LPA contributes this amount to the settlement from the proceeds of a "definitive" loan.[25]

The Housing Act also authorizes the Housing and Home Finance Agency (HHFA) to agree to make a forty-year loan and to permit the loan agreement to remain executory throughout the entire forty years.[26] The act further authorizes the LPA to pledge the HHFA loan contract as security for its own borrowings from private sources.[27] Bonds issued by LPAs for this purpose are exempt from federal income taxation.[28]

It is expected, therefore, that LPAs will in practice arrange permanent financing in the private market. The federal guarantee and tax exemption have worked throughout most of the urban renewal program to provide a private market for temporary financing at rates lower than those that attach to direct federal loans, and these same advantages are expected to attract private financing of the permanent loans covering leased land.[29]

URA has approved twenty-two requests by LPAs to lease land. All of these agreements carry with them either express or implied promises to make or guarantee the definitive or permanent loan necessary to enable the LPA to pay to URA the value imputed to the leased land. However, no project involving a lease has yet been closed out, and only one lease transaction has been completed through the definitive loan stage.[30] In some instances, LPAs have continued temporary financing to carry the investment in land under lease, and in still other cases, the leases have not yet actually been executed.

The right of a lessee to acquire clear title to the leased premises, whether expressed as an option or as a right to prepay a lease-purchase, counters the desire

[25] Section 102(a) of the Housing Act of 1949, as amended, 63 Stat. 414, as amended, 73 Stat. 654, 42 U.S.C. § 1452(a) (Supp. 1959).

[26] Section 102(a) of the Housing Act of 1949, as amended, provides that ". . . Such loans (outstanding at any one time) shall be in such amount not exceeding the estimated expenditures to be made by the Local Public Agency for such purposes, bear interest at such rate (not less than the applicable going Federal rate), be secured in such manner, and be repaid within such period (not exceeding, in the case of definitive loans, 40 years from the date of the bonds or other obligations evidencing such loans), as may be deemed advisable by the Administrator." 63 Stat. 414, as amended, 73 Stat. 654, 42 U.S.C. § 1452(a) (Supp. 1959).

[27] 63 Stat. 416 (1949), 70 Stat. 1097 (1956), 42 U.S.C. § 1452(c) (1958).

[28] See note 20 *supra*.

[29] If the LPA can obtain private financing at lower interest rates, § 102(c) of the Housing Act of 1949, as amended, authorizes the Administrator "to consent to a pledge by the Local Public Agency of the loan contract, and any or all of its rights thereunder, as security for the repayment of the principal of and the interest on the loan funds so obtained from other sources." 63 Stat. 414, as amended, 73 Stat. 654, 42 U.S.C. § 1452(c) (Supp. I, 1959).

The federal guarantee is evidenced by a requisition agreement by which the federal government agrees to make a loan to the LPA sufficient to pay the principal of and interest to maturity on the bonds. Provision for interest rates on Title I loans and advances applicable to contracts authorized is contained in URBAN RENEWAL MANUAL, § 17-6-8, as amended by Local Public Agency Letter No. 201.

[30] See note 10 *supra*. The lease from the Urban Redevelopment Authority of Pittsburgh, Pa., to the Public Auditorium Authority of Pittsburgh and Alleghany County is for a term of 45 years. It provides for a lease-purchase arrangement in that the lessee is given an irrevocable option during the term of the lease after construction and improvements to have delivered a deed for the property, provided that the lessee has paid the rentals and charges due under the terms of the lease.

of bond purchasers for a guaranteed minimum period of investment and the necessity of paying a premium upon redemption of the bonds. It should be noted that these two counter forces are not equivalent. Notwithstanding the customary payment of a premium for redemption, the bond buyer still wants assurance of some substantial period of investment. A premium sufficient to attract buyers for bonds subject to redemption in two years, for example, would be so high as to be prohibitive in practice. Educated guesses of men who participate in urban renewal financing and who will no doubt play a large part in marketing definitive bonds are that a minimum period of approximately fifteen years will be needed to assure marketability of the bonds.

If a redeveloper wishes to acquire the property through the medium of an option in a lease, it is not difficult to conclude that he should pay any additional cost occasioned by this method of acquiring title. In other words, his option price should probably be increased by an amount sufficient to pay the redemption premium. But, in addition to this internal financial apportionment, the redeveloper and the LPA must apparently also phrase the purchase option so as to postpone its exercise until fifteen years or more after the date of the definitive loan.

Although, as in the case of temporary financing, the federal guarantee and federal income tax exemption will be the two main attractions for the buyer of definitive bonds, the longer term and the existence of other interests in the land will make it necessary to add whatever other assurances may be available. Principal among these will be an assignment of the rents and, of course, the proceeds of any sale under the option.[31]

URA requires as a condition to the making or guarantee of a definitive loan that the rent be sufficient to pay off the loan in full within the terms of both loan and lease. The loans are limited by statute to forty years.[32] Since they are being repaid entirely by the differential between lease income to the LPA and the interest charges paid by the LPA, loans will tend to be for the full legal term. The law places no limit on the length of the leases, but as a practical matter, the loan term will tend to be the minimum term for the lease.

The long-term bond market differs materially from the short-term market in which urban renewal temporary loan notes are marketed. The implications of this difference are important to the LPA, if not to the federal government, because of the irretrievability of mistakes which may be reflected in the effective interest rate. One consideration of vital importance is the dollar amount of bonds made available to the market at one time. In order to do the kind of a job necessary to get a good

[31] Section 102(a) of the Housing Act of 1949, as amended, provides that the loan shall be "secured in such manner . . . as may be deemed advisable by the Administrator." 63 Stat. 414, as amended, 73 Stat. 654, 42 U.S.C. § 1452(a) (Supp. I, 1959).

In the definitive loan which was made pursuant to the lease to the municipal auditorium in the Lower Hill Project, U. R. Pa. 7-1, the bonds were given an exclusive first lien upon and a pledge of the income and proceeds derived from the lease. The city and county also guaranteed rental payments under the lease.

[32] See note 7 *supra*.

market, one bond house has estimated in private discussions that around $25 million should be the minimum amount of bonds to be marketed at one time. Since it will take a number of different lease situations to produce $25 million of definitive financing, and because of the other considerations just mentioned, it will be necessary for the Washington office of URA to exercise a degree of active control, supervision, and coordination over definitive financing different from and greater than that experienced in temporary financing.

Important as the federal guarantee is, and will be, to the marketing of temporary loan notes and definitive bonds, this guarantee is expressed by indirection.[33] The result is to complicate such financing unnecessarily, adding to the work and expense required of outside bond counsel and to the administrative processing and lapse of time in both the LPA and URA. An unequivocal, incontestable guarantee by the federal government, simply and directly expressed on the note, bond, or accompanying instrument would eliminate unnecessary processing, expense, and delay. No doubt one reason for the indirect expression of the guarantee has been a desire to avoid problems relating to the statutory debt limit. However, it seems possible to draft legislation eliminating the one set of problems without creating the other. There would be dollars of benefits to the temporary financing program for every penny saved in connection with definitive loans, and any such happy, everybody-wins-nobody-loses development (except for bond counsel, whose patriotism should certainly be equal to the test) should find bipartisan support in Congress.

III

IMPUTED VALUE

The Housing Act does not define a method for determining the value which is imputed to leased land as a substitute for sales proceeds. In the absence of some definitive interpretative guide, *a priori* reasoning suggests the imputed value is intended to approximate actual value *to the LPA* as closely as the imperfect process of hypothetical evaluation will allow. The final determination, which is subject to acceptance by both the URA and the LPA, is complicated by the fact that the interests of the LPA and the federal government are divergent under procedures hitherto in force.

Whatever influence the imputed value may, as a practical matter, have on the substance of the transaction, it is legally significant only in the settlement of accounts between the LPA and the URA. It need not be a factor in the leasing and financing arrangements. The LPA may battle for high rents, high option price, and low financing costs without committing itself to any figure as representing the value of the property for the purpose of settling with the URA. Obviously, it is to the benefit of the LPA to keep the imputed value as low as possible.[34]

[33] See note 29 *supra*.

[34] The imputed value is subtracted from the gross project cost to arrive at the net project cost, upon which the ⅔-⅓ division is based. The rentals received by the LPA over and above the imputed value and the loan cost are retained by the LPA and are not used to reduce net project cost.

Leases designed as vehicles for the ultimate transfer of title contain explicit indications of the value to the lessee-purchaser. The lease with an option contains a dollar figure. The commuted value of the payments under a lease-purchase can be easily calculated by using the going rate of interest at the time the deal was negotiated. But if these figures are used, another question arises. During the lease interval prior to transfer of title there will be a profit resulting from the differential between lease and interest rates and from the tax-exempt character of the LPA. To whom does this profit belong?

Regardless of their language, the substance of these leases is a delayed sale. If such a postponed sale had been consummated after a period of interim use producing the same profit, the money would have gone to reduce project cost and would thereby have been shared by the LPA and the URA. When the sale is disguised as a lease, unless the prospect of this profit is taken into account in value imputed to the leased premises, the entire profit (which results solely from federal guarantees and tax forbearances) will be realized by the LPA.

Although nothing in the Housing Act expressly forbids installment sales, options, or delayed sales, neither is there any permissive language indicating that such transactions might be so designed as to confer an interim profit to the LPA which would not be accountable as project income. It is reasonable to conclude that income not susceptible of diversion from a delayed sale may not be diverted by employing lease language.

The intent of the statute can be served and a divergence in the interests of the LPA and the URA can be avoided by taking this incidental profit into account in determining the imputed value. Considering the abstract quality of the value imputed to the land—and since the act deals in terms of *fair* value, not *fair market* value[35]—this value should be the value to the LPA, taking into consideration the surrounding circumstances, which include the existence of the profit under discussion. If the imputed value is taken as the option or purchase price increased by the profit incidental to the delay, the LPA and the URA will share in such profit in the same proportion as they share in other project income; the divergence of their interests disappears and the basic intent of the Housing Act for apportioning urban renewal costs is served.

The same principle can be applied with approximately the same results in the case of land subject to straight lease. The considerations restricting leasing to project land not marketable by sale have already been discussed. It has been mentioned earlier that (1) congressional emphasis of maximum participation of private enterprise in redevelopment precludes leasing as a method of disposition except when sale on reasonable terms is impossible; and (2) when urban renewal land is leased, the Housing Act recognizes that permanent public ownership of the land will result. A third necessary implication of the statutory provision for a forty-year loan to finance the leasing[36] is that the federal share of the cost of the land so transferred

[35] See note 1 *supra*.
[36] See note 26 *supra*.

to permanent local public ownership will be repaid from the lease proceeds, which necessarily means from the differential between net financing cost and the net return on the lease, a differential created by the federal guarantees and tax exemptions mentioned earlier. But should this subsidy be subject to expansion by force of circumstance or clever negotiation? In the long run, every policy or interpretation which forces the interests of the LPA and the URA into conflicting rather than coinciding patterns will be detrimental to successful urban renewal. The value imputed to leased land should take into account both the lease income and the financing costs to the LPA and be so computed that the income differential (over and above financing costs to the LPA) for the statutory forty-year loan term would equal the imputed value precisely.[37]

The conclusion is inescapable that the unresolved questions of "whether" and "whither" have retarded the development of answers to a third question, "how"—in the field of urban renewal leasing. The early resolution of the first two questions along the lines proposed in this article will benefit urban renewal, and is a worthwhile goal. However, the present existence of leasing commitments which must be completed, whether or not they should have been made in the first place, and the statutory provision for leasing as a means of disposition in appropriate cases indicate that one of the next major developments in the urban renewal technique will be a set of complete answers to the "how" of leasing, regardless of long-term developments with respect to "whether" and "whither."

[37] The situation to which this suggestion is directed, and the widely divergent results produced by the alternate approaches, is illustrated by the following projection based upon an actual lease by an LPA:

FACTS: The direct acquisition cost of the property was $194,452.42. Bids were taken on a 35-year lease, annual rental to be 6% of value bid. Successful bid, $201,000. Annual rental, $12,060.00. Financing rate called for in loan contract with URA, 2.76%. Taxes to be paid by lesser. For ease of calculation, single annual rent payments assumed.

ALTERNATE RESULTS: (1) If the value imputed to the leased property is $201,000, 35 annual payments of $8722.44 will service and retire the debt. The LPA realizes an annual profit of $3327.56 during the 35-year lease term, a total of $116,464.60, or the application of the full annual rental to amortization of the loan would service and retire the debt in approximately 22 years. The subsequent annual rentals belonging solely to the LPA would gross $136,780 over the balance of the lease term. The profit to the LPA in either case substantially exceeds the LPA's ⅓ contribution to the acquisition cost.

(2) The annual rental of $12,060 would service and retire a 35-year loan of $268,857.68. If a value were imputed to the leased property equal to the price which its own rentals would pay during the lease term, project proceeds would be increased by $67,857.68. Net project cost would be correspondingly decreased, to the benefit of federal and local governments in their contributing proportions.

In both alternatives, the figures are based on unencumbered ownership of the fee by the LPA at the end of 35 years, 5 years less than the maximum loan period set by statute.

Since the lease must be at least as long as the loan term, and the relationship between rentals and imputed value must be such that the rentals will completely service and retire the loan, if alternative (2) is adopted but the lease-loan term is left open for negotiation, the same divergence between LPA and URA interests will appear in determining the length of the term. This conflict can be avoided if the calculation is always done on the basis of a 40-year term.

THE RELATION OF LOCAL GOVERNMENT STRUCTURE TO URBAN RENEWAL

GEORGE S. DUGGAR*

Enthusiasts for a municipal activity which demands wide cooperation from all corners of local government are often likely to favor a clear hierarchy of authority, in which the policy is formulated at the top level of local government—whether it be mayor, council, or city manager—and then is put into effect from above. On the other hand, enthusiasts for a narrowly limited and self-contained activity are likely to favor granting to the organization responsible for the activity a substantial independence from the usual city hall chain of command. Since urban renewal requires both the widespread cooperation of many existing local government departments and agencies and the pursuit of some relatively limited and self-contained new activities, it is understandable that there has been no generally accepted doctrine as to which local government structure is the best for accomplishing urban renewal.

Adding to the complexity of discovering an optimum municipal organization for urban renewal is the fact that the administration of a redevelopment program does not end at the local level. Federally aided local renewal programs involve the close participation of the federal government—as well as that of private organizations, business firms, civic associations, neighborhood groups, and many others. How may all these elements best be coordinated?

Urban renewal is not so narrow and so immediate an objective that renewal enthusiasts dare neglect general local government procedures or authority structure. It is not so broad an objective that whatever contributes to good procedure and executive power, in general, will necessarily be good for urban renewal. Renewal involves "middle-range" objectives which demand both a certain freedom of action in limited fields, and some centralization of responsibility and authority in local government. In this connection, consider the recent observation of a businessman that "in the past we have generally thought of municipal operations as separate and distinct service functions—police, fire, schools, zoning, sanitation, and so forth ... the greatest impact of federal programs for urban renewal has been to change completely our purposes and aims of city government. While municipal services continue to be important, we must now look additionally for local governments to think in terms of the economic growth and development of the community."[1]

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[1] Palmer, *National Programs Affecting Urban Economic Growth*, in COMMITTEE FOR ECONOMIC DEVELOPMENT, THE LITTLE ECONOMIES: PROBLEMS OF UNITED STATES AREA DEVELOPMENT 48 (1958).

I

THE URBAN RENEWAL ENTERPRISE

Because of this dual focus of urban renewal, it may be helpful to examine urban renewal as an *enterprise*. An enterprise is defined as "an attempt or project, especially one which involves activity, courage, energy, or the like; an important undertaking."[2] A description of local government organization in urban renewal may appropriately begin with this awareness that widely varying participants engage together in an activity having important substantive goals, demanding a high level of activity, and calling for a forward-looking and venturesome frame of mind in which prospects are weighed and a strategy developed to overcome anticipated obstacles. This is a special type of administration. The activities which the literature of administration illuminates range from routine to innovative, from the largely habitual to the freshly planned.[3] We must be prepared for a large measure of innovative management and freshly planned organization when we attempt to describe the administration of urban renewal.

The concept of an enterprise is important not only for what it *is*, but also for what it *is not*. An enterprise is not necessarily fully recognized from the start by all its participants; and it may have a structure different from that of any of the formal organizations which participate in it. To be sure, an enterprise's structure may parallel that of a formal organization; but the differences between an enterprise and a formal organization, as well as the rather abstract similarities, are important for our purposes. A formal organization may participate in several enterprises, and an enterprise may depend upon the participation of several formal independent organizations. The most familiar example of an enterprise may be a construction project in which are associated, for the time being, several independent

[2] WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 853 (2d ed. unabridged, 1950).

[3] The literature of administrative analysis attempts to formulate general perspectives for understanding local organization. Sometimes the emphasis is on a goal or goal cluster such as "efficiency and economy," sometimes on a method such as "scientific administration," sometimes on realistic analysis of power as in the "pressure group" (or "interest group") and "community power structure" approaches. Sometimes social psychology is stressed in the analytical scheme. Each of the perspectives has added to a general understanding of administration; but at present, we are left with a description which concentrates on one organization at a time and on its "equilibrium" condition, rather than its process of organizing and changing. While there is no one work which calls itself a history of administrative doctrine, articles and collections of readings provide an overview. American administration in the 1940's was summarized in four articles in the *Public Adminstration Review*, three of which are relevant here: Gaus, *Trends in the Theory of Public Administration*, 10 PUB. ADMIN. REV. 161 (1950); Ascher, *Trends of a Decade in Administrative Practices*, *id.* at 229; Sayre, *Trends of a Decade in Administrative Values*, 11 *id.* 1 (1951). Summary history of administrative philosophy is provided in Sayre, *Premises of Public Administration: Past and Emerging*, 18 *id.* 102 (1958); and Stover, *Changing Patterns in the Philosophy of Management*, 18 *id.* 21 (1958). The philosophy of public administration is analyzed comprehensively in DWIGHT WALDO, THE ADMINISTRATIVE STATE: A STUDY OF THE POLITICAL THEORY OF AMERICAN PUBLIC ADMINISTRATION (1948), which also contains a selected bibliography on the development of administrative theory. Three collections of administrative readings are: ALBERT LEPAWSKY, ADMINISTRATION: THE ART AND SCIENCE OF ORGANIZATION AND MANAGEMENT (1955); FELIX NIGRO, PUBLIC ADMINISTRATION READINGS AND DOCUMENTS (1951); and DWIGHT WALDO, IDEAS AND ISSUES IN PUBLIC ADMINISTRATION (1953).

organizations, a client, architects, engineers, contractors, subcontractors, and local building inspectors—all ordinarily independent but all cooperating in one way or another in a project.

All federally aided local urban renewal enterprises draw upon the federal government, some local government or governments, some private firms acting as redevelopers or rehabilitators, some households and firms which own affected property, some civic organizations as supporters or opponents of urban renewal, and the mass media as channels of communication and information. It is difficult to coordinate all of these elements within the framework of a particular local situation. Nonetheless, the relationships, one to the other, of these different participants in the urban renewal enterprise cannot be neglected—nor the import of those relationships in determining which kind of internal organization in local government is most suitable for renewal. What guidance does the enterprise perspective offer toward the optimum form of local government structure for accomplishing urban renewal?

Obviously, not all interested citizen organizations can be lumped together (like a united fund, or community chest) into a single superorganization. And even if this were possible, it would still be necessary to allow for the role of the federal government, mass media, and "the market" for blighted and redeveloped properties. Furthermore, account must be taken of the varying degrees of independence among different local governments—and even among the units nominally within one local government. For instance, the territorial fractionation displayed in metropolitan areas, which contain on the average about 100 local governments each, may affect urban renewal. And surely it is not unimportant to urban renewal in a central city when a ring of suburbs maintains building and subdivision standards which discourage construction of low- and middle-value residential housing, or when a suburban government opposes dispersion of minority ethnic groups.

Overlying government units may also have their effect, favorable or unfavorable. For instance, the actions of the county government may affect solution of the relocation and rehousing problems. And the independent school board or district may be enthusiastic about the opportunity through urban renewal to enlarge school playgrounds and improve the surrounding area as a residential neighborhood. In other words, many activities important to urban renewal lie outside the local government's direct control—irrespective of the internal structure of the local government itself.

Consider also the formally independent municipal bodies politic and corporate, such as the thousand or more housing authorities (many authorized to conduct redevelopment), and the hundreds of similarly constituted redevelopment agencies.[4] Also, bodies within city government—such as planning or zoning commissions, or boards of adjustment—may be possessed of a degree of independence, and often are headed by a board with long, staggered terms or by a directly elected official.

[4] NAT'L ASS'N OF HOUSING AND REDEVELOPMENT OFFICIALS, HOUSING AND URBAN RENEWAL DIRECTORY 232 (1958).

Moreover, the units important in urban renewal may be so widely and thinly scattered among major city government departments that no department head would make urban renewal his major responsibility. In this event, which would better accord with renewal administrative needs—superimposing a renewal staff coordinator over all local government renewal activities, or transferring some to a new line "Department for Urban Renewal"?[5]

In practice, many cities do not bother to use either alternative. Among 242 cities of 5,000 or more population which reported on the coordination of renewal in a survey conducted in 1958, only 158 reported a central agency or official coordinating or administering "a substantial amount of the urban renewal program."[6] The other thirty-five per cent did not claim to have a central agency. Furthermore, some of the central agencies are merely committees; of the 158 cities, only 127 had a full-time director of the central renewal agency. In fifty-three of these 127 cities, the director of the central agency was appointed by a corporately independent redevelopment or renewal agency, which may not have authority over any city department and nowhere exerts police power for enforcement of ordinances governing the conditions or construction of housing.[7] There, in terms of formal organization, the "central" agency was not in a position to insist on coordination among the enforcement agencies and the redevelopment and public housing activities.

Even when the central coordinating agency for urban renewal is itself part of the city government, it ordinarily lacks some of the formal authority to obtain absolute adherence to its decisions. In the survey, this held true of all the full-time directors of central renewal agencies—thirty-one appointed by city managers, twenty-one by mayors, and seven by city councils.

II

HISTORICAL INFLUENCES AND FEDERAL REQUIREMENTS

Certain historical influences are reflected today in the municipal organizational structure within which urban renewal must operate. The professionalization of city government which was accelerated by the reform movement in the second half of the nineteenth century was eventually extended to the chief executive in the form of council-manager government—which also ordinarily strengthened the entire hierarchy of authority in city government. However, even in council-manager cities,

[5] The literature of administration calls for supplementing the executive model by grouping activities "like" in purpose, process, clientele, or service area. See, *e.g.*, LUTHER GULICK & LYNDALL URWICK (EDS.), PAPERS ON THE SCIENCE OF ADMINISTRATION 15 (1937). The idea that a group of activities are "like" in the sense that they serve renewal purposes, or follow renewal processes, or serve a renewal clientele, or come to bear on renewal areas assumes at least a potential renewal enterprise. That potential enterprise is defined by the opportunities indicated by federal and state legislation and by the local situation and by experience in other localities which have availed themselves of similar opportunities.

[6] Lange, *Housing and Urban Renewal Redevelopments in 1958*, in INTERNATIONAL CITY MANAGERS ASS'N, MUNICIPAL YEAR BOOK 324 (1959).

[7] One model state enabling act circulating in 1953 proposing police powers for Conservation Authorities is reviewed in JACK M. SIEGEL & C. WILLIAM BROOKS, SLUM PREVENTION THROUGH CONSERVATION AND REHABILITATION 139 (1953).

there are marked variations today in the extent to which a well-defined hierarchy of authority exists in such local government. Still less hierarchical are some of the cities having mayor-council government and the thirteen per cent of American cities of 5,000 persons or more which have commission government.[8]

The Great Depression encouraged establishment of municipal tax and debt limitations; and these limitations are, of course, very significant in the allocation of municipal resources for urban renewal. Furthermore, during the Depression, a number of independent authorities were spawned, which in many instances became models for urban renewal commissions or were themselves entrusted with responsibility for the urban renewal enterprise. Under the Housing Act of 1937,[9] annual grants were made to local housing authorities, which were separate corporate bodies and which, on the basis of promised federal grants and anticipated rents from public housing projects, could borrow funds to build the projects. Since the debt was incurred by the housing authority, rather than the city, an escape was provided from debt limits which the downward drift of assessed values during the Depression had made especially onerous. The corporate authority device had obvious relevance as a means for freeing urban renewal enterprises from municipal debt limitations. On the other hand, the relative independence of the corporate authority—due to long, staggered terms of the members of their governing boards[10] and freedom from personnel and budgetary controls—presented problems in coordination.

Federal requirements are relevant for the distribution of authority among private, municipal, and federal participants. The Declaration of National Housing Policy emphasizes private participation and local government responsibility.[11] The emphasis on private enterprise is expressed further through project planning procedures which call for evaluation of the project's soundness in terms of market demand. The emphasis on citizen participation is manifested in the workable program requirement with respect to such participation, and through provisions for public hearings. The emphasis on local government responsibility is seen in requirements that each project application have the approval of the local governing body and each workable program bear the signature of the city's chief executive.

[8] See section on governmental data in INT'L CITY MANAGERS ASS'N, MUNICIPAL YEAR BOOK (annually).

[9] 50 Stat. 891, 42 U.S.C. § 1409 (1958).

[10] Typically, a commission of from three to seven members, usually five, heads the local housing authority. Terms ordinarily do not exceed five years, but commissioners may be reappointed. CAL. HEALTH & SAFETY CODE § 34272; ILL. ANN. STATS. ch. 67½, § 3 (1959); MICH. COMP. LAWS ch. 125 (1952); MO. REV. STAT. ch. 99 (1956); OHIO REV. CODE SERVICE ANN. § 3735.01 (1956); PA. STAT. ANN. tit. 35, ch. 18, § 1545 (1956); TENN. CODE ANN. tit. 13, ch. 9 (1956). Note that in Ohio, only two members of five on a metropolitan housing authority are appointed by the mayor. Two are appointed by courts and one by the board of county commissioners.

[11] 63 Stat. 413 (1949), 42 U.S.C. § 1451 (1958). State statutes do not greatly change the breadth of goals, since the statements of purpose in the statutes of the several states conform so closely to national legislation and to each other. Indeed, the state enabling statutes tend to be kept in conformity with federal legislation as it is amended, so that the localities may be in a position to utilize all available federal aid whatever the current emphasis. In taking property by eminent domain, the use of the taxing power, and so forth, state constitutional restrictions do, however, sometimes hover in the background as a limitation on the objectives which can be pursued under urban renewal.

Contrasting with these unequivocal procedures is the circumspect federal language concerning the structure within local government. The National Housing Act of 1949 refers to a local public agency as "any State, county, municipality, or other governmental entity or public body, or two or more such entities or public bodies, authorized to undertake the project for which assistance is sought."[12] To apply prior expertise obtained with publicly financed low-rent housing, many states assigned redevelopment to local housing authorities as an additional duty—and sometimes formally redesignated them housing and redevelopment authorities. Other states provided for a new type of authority with its own governing commission, executive director, and staff—a structure similar to the housing authority's. A few states quite early enabled city governments themselves to conduct redevelopment operations or permitted local choice of administrative structure. In federal language, these are all referred to as "local public agencies."

Of key importance has been the broad definition of local public agency (LPA). The federal government contracts with it; but its meaning varies from place to place according to the types permitted by state laws. Under the Housing Act of 1949, few states enabled the city to be its own local public agency;[13] the role of the city government was limited. City Council approval of project plans was, however, required as a condition of federal aids. An early form of model state enabling legislation suggested by the Housing and Home Finance Agency (HHFA) offered no inducement for states to permit local choice of the type of LPA. However, subsequent to the Housing Act of 1954, HHFA proposed an enabling statute designed to encourage more local experimentation, and specifically to place the city government and its chief executive in an important role; under this proposal, urban renewal authority would be "conferred on the municipality itself or on one of several other prescribed public bodies selected by the municipality." For states with enabling legislation which followed the earlier model, HHFA stood ready to aid in modifying legislation to permit greater local option. Under the Housing Act of 1949 and related federal regulations, the only city official whose signature had to appear on applications was one "required to sign" under state law or one who served as "recording officer" for the local governing body. The city's chief executive came into a formal role in federal project regulations in 1954:[14]

> When it appears from the initial application for an advance of Federal funds for an urban renewal project that the proposed project will involve activities to be carried out by some entity other than the Local Public Agency submitting the application—such as the municipality—it will be necessary that the application be accompanied by satisfactory evidence that such other entity will actually carry out such activities and has the capacity to do so. Such evidence may consist of an appropriate statement of the chief executive of such entity.

[12] 63 Stat. 420, 42 U.S.C. § 1460(h) (1958).
[13] Among the early ones were Michigan, New York, and Ohio.
[14] Urban Renewal Administration, Local Public Agency Letter No. 45, 1954, pp. 1-14.

The Local Public Agency Letter outlining this requirement also suggested that "consideration may be given by the community to the desirability of establishing an office for the over-all coordination of urban renewal activities in the community." While there is no requirement that this be a city official, it is noted that, "in some cities, a coordinator for such purposes has been appointed by the mayor, and such coordinator reports directly to the mayor respecting the performance of his functions."[15]

The fourth of the seven elements of the Workable Program requires "a firmly established administrative responsibility and capacity for enforcement of codes and ordinances and for carrying out renewal programs and projects."[16] This has not been used as a springboard for the federal government to leap into the local organization pool. Examination of regional office memoranda on the subject indicates that the requirement has been brought to bear chiefly on code enforcement agencies, and there chiefly to assure that personnel will be adequate. Federal literature suggests that "a local official be assigned the responsibility for preparing for the signature of the chief executive of the local government an application for initial certification of a workable program,"[17] but this official need not be a subordinate of the city executive. Indeed, in many cities, the Workable Program is prepared by the staff of a corporate authority; in some cities, by planning commission staff; in others, by a consulting firm. It is by no means settled that the immediate staff of the chief executive prepares the Workable Program.

III

RELATIONSHIP BETWEEN URBAN RENEWAL ACHIEVEMENT AND FORM OF GOVERNMENT

In pursuit of the broad objectives set forth in federal and state statutes, a renewal program is locally developed which can induce the participation of several formally independent organizations and individuals. Within the generally blighted area, a particular portion is chosen as the first project. It may be chosen not because it is the most blighted portion, but because the market for renewed property there is most assured, or because the owners of property there have the financial credit which most readily permits them to participate, or because in this section there is a local organization which best assures neighborhood communication and cooperation, or because the location is so prominent that its renewal will demonstrate the program to most of the city's citizens.

As urban renewal proceeds into the first project and beyond to later projects, there will be ebbs and flows in active participation and public interest. Of course, the execution of a project will be widely regarded as the single great moment for changing the character of an area, so that public interest will be heightened in this

[15] *Ibid.*

[16] HOUSING AND HOME FINANCE AGENCY, HOW LOCALITIES CAN DEVELOP A WORKABLE PROGRAM FOR URBAN RENEWAL 8 (1956).

[17] *Id.* at 3.

stage. And perhaps the long preparation and planning for the project or the struggles of disposition will be less actively supported by the public. Perhaps, too, one project will attract special attention, and everything later will seem anticlimactic.

Under these circumstances, to achieve both the early accomplishment of statutory objectives and the building of an enterprise with assured continuity sufficient to complete the urban renewal task, a strategy is needed which will guide the choices to be made between myriad competing alternatives.[18] The standard for evaluating urban renewal achievement must reflect this variability of strategy and must reckon not only how much *has been* accomplished, but also how much now *appears probable* of accomplishment.

In order to evaluate urban renewal achievement at the local level, the writer surveyed the renewal enterprises of cities distributed throughout the United States, under a grant from the Urban Renewal Administration. As a first step in the study, the ninety-three cities which by mid-1957 had advanced at least one renewal project to the execution stage were analyzed by type of government (council-manager or mayor-council), type of LPA (city, redevelopment authority, or housing and redevelopment authority), date of entry into the urban renewal program, speed of progress, and population.[19] Because a skewed distribution resulted when form of government and type of LPA were listed by population size, cities at the population extremes were eliminated (approximately one-third of all cities studied). This helped to clarify the effect the form of government and type of LPA had on progress. The study of progress to July, 1957, showed that:

1. Once having entered the program, cities with different general forms of

[18] The choices, of course, are limited in many respects by reason of the procedures prescribed in federal and state legislation and regulations. For instance, the federal statutory emphasis on cooperation between public and private participants tends to receive strong local support and itself becomes both a program objective and a determinant of the authority of each urban renewal participant. State laws may determine the form of local government organization. As a consequence of these constraints, the local choices are more in the nature of alternatives for cultivating a given seed, rather than for creating a new product.

[19]

Form of Organization	*Cities of 5,000 or more Population in U.S. End of 1957*	*Cities Active in Renewal Program, July, 1957*		
		Total	*Project In Execution*	*Surveyed*
Mayor-council	1,297	94	45	10
Council-manager	834	60	22	8
Other forms	422	54	26	0
	In Project Directory			
City as LPA	42	40	10	6
Housing and redevelopment authority as LPA	107	89	54	6
Redevelopment authority as LPA	101	79	36	6

SOURCES: Data on numbers of cities in program are from HHFA. Total numbers of cities of 5,000 or more population by form of government are from INT'L CITY MANAGERS ASS'N, MUNICIPAL YEAR BOOK (1957). Numbers of such cities by type of LPA have been calculated from data in NAT'L ASS'N OF HOUSING AND REDEVELOPMENT OFFICIALS, HOUSING AND URBAN RENEWAL DIRECTORY (1958).

government displayed no significant difference[20] in tendency to arrive at final planning or execution stages, nor in tendency to drop out of the program.

2. Council-manager cities were underrepresented in the program but entered in increasing proportion in later periods.

3. Forms of government underrepresented among the early entrants tended to advance more rapidly once they had entered the program, but this difference was not statistically significant.

4. There were significantly lower percentages of the city LPAs and higher percentages of combined housing and redevelopment authorities among cities which had reached later stages of procedure. (This was explained by the later date of entry of more of the cities which were their own local public agencies).

5. Redevelopment authorities showed a significantly slower rate of advancement through the procedure than did either housing authorities or city LPAs. Possibly, however, the delays experienced by the redevelopment authorities were due to the necessity to organize a staff and to the litigation of the powers of these authorities.

The data showing later entry but swifter action by council-manager cities raises questions having to do with this form of government and the kind of community which adopts it. Presumably council-manager government gives *less* emphasis to differences within a community, while mayor-council government gives *more* emphasis to such differences. In council-manager governments, the council is more generally expected to arrive at some sort of consensus of views; the task of the council may even be interpreted as finding the best means to ends which are assumed to be agreed upon. In mayor-council government, on the other hand, continuation of differences may be more generally expected. In fact, one argument for a popularly elected chief executive lies in the presumed ability of such an officer to maintain the operation even while differences of view in the council are sharp and intensely felt. These dissimilarities in the two forms of government may affect the way in which they receive any new enterprises which bristle with thorny issues.

Thus, in council-manager governments, officials and other leaders may tend to place a higher value on maintaining the sense of agreement and so may postpone entry into a renewal enterprise until agreement is more certain. This caution may be all the more necessary where the balance of support for the council-manager plan rests on a shaky sense of general agreement or upon a none-too-convinced group who might be antagonized by some aspects of renewal. In mayor-council cities, leaders may be more ready to risk opposition, seeing it as inevitable and general consensus as impossible; they may, in fact, place a value on pointing up the disagreements which do exist in order to maintain party discipline, or even to prevent adoption of the council-manager plan. Perhaps, too, leaders of council-manager governments, placing a higher value on nonpartisanship, may have waited until they saw that

[20] Significant differences in the numbers of cities reaching various stages was indicated by a Chi Square of more than 3.84, under an assumption that a relation is significant when in 95 out of 100 cases, it cannot be attributed to chance. Chi Squares from 3.84 and 21.99 were calculated for the relationships summarized in the text.

renewal had not only a Democratic version, but a Republican version as well (after 1952) before they risked entry into the program—not that council-manager governments are necessarily more Republican, but because their leaders wanted to avoid a partisan split.

The possibly swifter action by council-manager governments hinted at but not proved by the data might reflect the lesser ability in council-manager government of the lingering opposition to delay a program once adopted by a majority of the council. Weak-mayor structures of authority (found in some mayor-council governments) might make difficult the elimination of delaying tactics within the city governments even after adoption of a program by a majority of the council.

IV

CLUSTERED CASE STUDIES

To provide deeper insight into urban renewal achievement and its relationship to organizational structure and to other factors, case studies were made of twenty local renewal enterprises. Systematic comparisons were made in six groups of three cities—eighteen of the twenty. When each of a group of three cities is assigned a letter *A, B,* or *C,* the three following pairs of cities may be compared: *AB, BC,* and *AC.* The following steps were taken to make the pair comparisons systematic and to reduce bias.

The only cities included were those with less than a million population, having either mayor-council or council-manager governments. All had a reputation for renewal success with personnel of the appropriate regional offices of the HHFA. To make possible the grouping of judgments among as many different persons as possible, six different observers each contributed; their reports were then added up and are presented in the accompanying table. Each observer compared a city having a council-manager government with a city of about the same population size but having a mayor-council government; and also compared a pair of cities standardized for general form of government but contrasting in population size. Finally, each observer compared a pair differing in both respects—these being termed the "supplementary pairs."

Each observer confined his attention to cities having one type of LPA. However, the director of the study briefly visited cities with all three types of LPA and studied case reports to determine the effects of differences in LPA. Three of the observers confined their comparisons to cities within one HHFA region; three spanned two or more regions. The eighteen cities constitute at least ten per cent of all the cities in the category from which they were chosen.

Each observer began his studies in each city by preliminary review of documentary materials, followed by individual interviews with each of a panel of twenty-four persons occupying preselected public and private "positions in the community." In each city, on the basis of the early interviews (which tended to

Characteristic Taken as Dependent, and Pairing Principle	Distribution of Pairs of Cities among Two Classes for Each Characteristic Taken as Independent. Showing Pairing Principle					
	Population Size		General Form of Government		Mode of Coordination	
	Large	Small	Mayor-Council	Council-Manager	More Executive	Less Executive
Greater Achievement						
Standardized Pairs					*Group 1*	
Recent Achievement	3	3	2	4	7	2
Cumulative Achievement	5	1	2	4	7	2
Supplementary Pairs					*Group 2*	
Recent Achievement	5	1	3**	3	4	4
Cumulative Achievement	4	1	2**	3	6	3
All Pairs						
Recent Achievement	8	4	5	7	13	5
Cumulative Achievement	10	2	4	7	11	6
More Executive Mode of Coordination						
Standardized Pairs	3	3	3	3	—	—
Supplementary Pairs	3	3	1	5**	—	—
All Pairs	6	6	4	8	—	—
More Leadership by City Chief Executive						
Standardized Pairs					*Group 1*	
Committed Activity	2	4	4	1	7	2
Leadership influence	2	4	5	1	8	1
Supplementary Pairs					*Group 2*	
Committed Activity	2	4	0	6**	7	2
Leadership influence	4	2	2	4**	6	3
All Pairs						
Committed Activity	4	8	4	7	14	4
Leadership influence	6	6	7	5	14	4

‡ Includes two extreme instances of weak-mayor structures.
* Includes two very small council-manager cities.

be with officials), the observer was free to make additions, and occasionally deleted from his inquiry some positions locally reported not to be participants in renewal.

To supplement objective data on achievement, the observers asked their respondents about the goals of the renewal plan, the problems which had been met, and the reasons for success; and they probed for the respondent's view of the adequacy of the urban renewal enterprise in respect to financial plan, organization, popular and administrative support, market appeal, and concern for the interests of property owners, occupants, and the neighborhood.

The observer's judgment on achievement was checked by reference to four available statistical measures. Neither the observers' judgments nor the statistical measures provided perfect standards for determining comparative achievement. The statistical data is objective in the sense that the quantities can be checked, but the standards are biased and insufficient in several specific ways, as well as in the implication that any one measure or small group of measures may properly be applied to all renewal

enterprises.[21] Also, the statistical standards give no weight to the whole question of future continuity of the enterprise—whether or not it is a "one-shot" affair. On the other hand, the observers' judgments about achievement are personal judgments. They avoid the fallacy of applying one standard to eighteen different enterprises; and each observer attempted to develop a standard which would be appropriate for his three cities. The judgments reflect quantitative information and yet do not exclude factors not easily quantified—such as the prospective continuity of the enterprise and the suitability of the enterprise's strategy to the situation.

Actually, in most of the comparisons between a pair of cities, there was little question as to which had the greater achievement. A majority of the statistical measures differed from field judgment in four of the eighteen pairs. In all four cases, the larger city was given the higher achievement rating by the observer, quite in contradiction to the quantitative data, but for reasons which he defended, calling into question the relevance of available quantitative information.

Because the cities had not all entered the redevelopment and renewal enterprise at the same time, and because some greatly changed their formal organization along the way, it was necessary in some cases to distinguish recent or more comparable achievement from cumulative achievement (which in some cases could be traced back as far as 1950).

In studying the mode of coordination (*i.e.*, the degree to which coordination was executive in character),[22] the observers, besides gathering documentary evidence,

[21] The four standards use the very limited data available: per cent of substandard dwelling units eliminated and per cent of city area in renewal projects, and ratios of (1) eliminated substandard units and (2) gross costs to population (per thousand). It would be better to relate project area to blighted area and to relate gross project costs to income. The several measures provide only a first stab at indicating how much of the total problem has been met, how much of the total task or workload has been shouldered, and how large and expensive the accomplishment and workload has been relative to the size or capacity of the community. More research is needed on the measurement of substantive accomplishment. Unfortunately all the data are for whole projects, not for the portions actually accomplished. This is a grave defect, since a project in planning is given as much weight as one in execution. Nonproject activity is not reflected.

[22] Influenced by the doctrine of separation of powers, by the contrast in procedures between the executive and the other two branches, and also by the scope of their "reorganization" assignments, administrative analysts have concentrated their attention on the executive branch. By the time even the first textbooks on public administration were published, a common pattern was discernible in the recommendations for that branch: "integration." Despite criticism, this remains a very important doctrine in administration, perhaps its most easily defended version being the line-and-staff model.

To examine this model as it relates to urban renewal—and to put this model in its best light, while at the same time indicating some of its possible limitations for accomplishing urban renewal—several assumptions are made for purposes of this article. Assume, first, that a local legislative body (for example, city council, commission, or board of aldermen) has entered upon a program of federally aided urban renewal; that this local governing body has approved a policy for urban renewal activities to advance on a planned basis through the city area by area, approximately in the order of the degree of blight and as rapidly as uncommitted financial resources, relocation opportunities, and other legislative policies permit; and that procedures exist for hearing recommendations from city executives and others permitting response and change in policies. Assume, next, that some other guidelines are also fairly well established, including a general citywide physical development plan; a capital improvement program coordinated with a schedule of debt retirement, a revenue system, and an executive budget; that there is a policy for relocating those displaced in the course of any public works or activities; and that there are ordinances and an administrative structure for conducting municipal services, including regulatory codes. Finally, assume that the over-all structure of government is intended to utilize studies of conditions in ways which

asked their respondents to describe how advice and information were supplied, whose reactions and attitudes were most important in the respondent's urban renewal decisions, and the ease or difficulty of access to such persons. That is, the observer sought chains of communication and authority. Sometimes frequent links of communication and authority were observed among people not within a formal chain of command. Sometimes the chain effectively ended at the level of a local government administrative or corporate board. Sometimes a superior did not have enough renewal information or the available information was not used to guide a subordinate's participation in urban renewal. In these and other ways, the coordination of the enterprise failed to be executive in character.

In the sense in which leadership was evaluated in these field studies, any participant in an urban renewal enterprise may be a leader in it—and perhaps most are. The degree of leadership is indicated by the degree to which the leader's relation to other participants tends to have consequences for change in the enterprise. Included as leadership are his influences on any or all of the structural elements of the enterprise, its program, procedures, or mode of coordination; the leadership may be exerted through actual communication, formal and informal, or simply through people's expectations of the leader's reactions.

One mark of leadership in an enterprise like urban renewal is "bridging." In bridging, leaders work together as an informal or only secondarily formal group to maintain and advance the enterprise by coordinating organizations and individuals which recognize each other's independence. To some degree, approval on the part of organizations in which the bridgers are members is merely anticipated—not previously and specifically granted by the organizations.

According to the field studies, the "leadership influence" of the executive appears

help to sustain citizen control of the local government and help to bring administrative practice into line with such policies.

Under the foregoing assumption, most of the larger issues of program planning for the municipality need not be fully resolved within the administrative system for urban renewal, since they have already been settled by policy decisions of the legislative body. Against this background, we can construct the following "executive model": All the major activities contributing to renewal objectives, including the activities conducted in each project area—such as redevelopment and areawide code enforcement—and certain citywide services—such as rehousing aid for those displaced from the projects—are placed in one department of city government, this department having at least as direct and privileged access to the chief executive as any other department. The chief executive of the city, a clearly defined office (whether manager or mayor), has formal powers of budget review and appointment and removal of the head of the department. The department head has similar powers over the major units within his department. Staff services exist within the department suitable for reporting and planning the department functions and staff officers for the department have direct access to the department head. Comparable arrangements exist in the city government as a whole. The staff services within the department are adequate (1) to keep track of progress in each subordinate unit and alter instructions accordingly for other units so as to maintain coordination, and (2) to obtain data and offer plans for succeeding projects. The reporting procedures and staff units for program planning and adjustments are adequate for planning the municipality's use of each major type of scarce "resource," and there is a general category for all other needed administrative planning (such as is often assigned to a general "assistant to" the executive). No special provision is made for formal "citizen participation" in the local government structure except in the governing board of the city; and there is no provision for "neighborhood" representation, unless—under some sort of ward system—the governing board is itself wholly or partially constituted of such representatives.

dominant more often in mayor-council cities than in council-manager cities. This, in turn, may reflect in part the previously remarked differences between mayor-council and council-manager governments with respect to extent of agreement prior to commencing an urban renewal enterprise. In a few cases, it might reflect a mayor's decision that urban renewal was a useful program on which to stake his political fortunes—with consequent maximization of the leadership efforts he put into achieving successful, and speedy, urban renewal.

And yet, by a very slight margin, greater achievement and "committed activity" by the chief executive appear to be somewhat more often characteristic of the council-manager cities than of the mayor-council cities. By a higher ratio, a more executive mode of coordination is found more often in the council-manager cities.

The results are ambiguous, however, because they appear to be affected by one systematic factor other than the form of government—namely, population size—as well as by some chance factors. The population factor may contribute to differences between the ratios reported for pairs which have been standardized to eliminate population contrast and supplementary pairs which contrast in population size. Inclusion of the supplementary pairs tends slightly to reduce the ratio for council-manager cities with respect to achievement, and importantly to increase the ratios of the council-manager cities with respect to executive coordination of urban renewal, and committed activity and leadership influence of the city's chief executive. Among the specific cities included in the supplementary pairs, two out of three of the council-manager cities happened to be much smaller than the respective paired mayor-council city. Also, among the mayor-council cities in the supplementary pairs, two out of three council-manager cities happened to be very much smaller than the respective paired mayor-council city; and, among the mayor-council cities in the supplementary pairs, two out of three happened to have an extremely weak-mayor formal structure of authority.

With all these factors in mind, we find that form of government is not decisive. From our survey cities we conclude that:

1. Achievement is not consistently associated with form of government, although council-manager cities have a slight "edge."

2. Mayor-council cities slightly more often than council-manager cities display the city's chief executive as the dominant leadership influence, while council-manager cities slightly more often display him as the most committed active leader.

3. The mode of coordination is slightly more executive in council-manager cities.

4. A combination of form of government and population size may affect the leadership of the executive and mode of coordination.

In respect to population size as the "independent variable," the observers found that:

1. Smaller population was accompanied by primacy of the chief executive in committed renewal activity. No difference appears in the totals to indicate that size

affects the chief executive's leadership influence. However, the standardized pairs show his influence greater in small cities. The tendency for mayor-council cities to thrust their chief executives ahead as influential leaders may, therefore, somewhat obscure the greater leadership role of small-city executives.

2. Contrast in population appears not to affect mode of coordination.

3. Larger cities had the higher level of achievement, as judged by the observers.

Cities were not preselected for similarity or dissimilarity in mode of coordination. The mode was determined only through the field studies. Lack of preselection has both advantages and disadvantages. When not preselected, all eighteen of the pairs instead of twelve are available for comparison, since we have not eliminated any pairs for known lack of contrast. On the other hand, when we do not preselect, we run the risk of finding very little contrast in mode, a contrast which, of course, would have been assured had we preselected for the purpose of displaying that contrast.

Taking the undifferentiated group of eighteeen pairs, we find definite tendencies in respect to each of the characteristics studied. More of the cities with the more executive mode are judged by observers to have a higher recent renewal achievement, a higher cumulative renewal achievement, and to display the chief executive as more dominant in committed activity and also in leadership influence.

Since supplementary and standardized pairs showing mode of coordination as a basis for check were not available, another method was used. The eighteen cities were split on an arbitrary basis so that two groups of nine pairs each were identical with respect to the number having each preselected characteristic. This check (shown on the table) indicates that variability, though present, is not serious.

V

CHANGE IN MODE OF COORDINATION

The observers also sought to determine any tendency towards change in the manner of coordinating urban renewal as time passed and the enterprise progressed. While observations were far from unanimous, in most of the eighteen cities there seems to have been some trend toward a more executive mode of coordination. However, the requisite high level of activity by the chief executive in certain stages of urban renewal blurs this tendency. Also, it is sometimes obscured by the legal limits within which the local program operates.

Where the city is the LPA or where there is a redevelopment agency, "renewal coordinators" or "directors of renewal" tend to be set up for coordinating redevelopment and code enforcement. This is evidenced by the establishment of such offices and by the centralization of power to resolve differences affecting renewal. Where there is a housing and redevelopment authority, the authority itself usually develops from the outset along executive lines; and this does not change much as urban renewal progresses. In that situation, "bridging" is apparently used to coordinate the authority's activities with those of the local government; the bridgers tend to

include commission members who govern the authority, councilmen, and even business and civic leaders without public office, as well as full-time officials. In some small cities, the planning commission serves as the chief coordinating group for urban renewal, and so makes unnecessary any other bridging groups.

In general, where there are local government administrative boards or corporate authorities, there is both a greater need for bridging to take place and a tendency for the chairman and the highest subordinates of boards or commissions with urban renewal roles to lead by bridging. On the other hand, where a chief executive leads the local government and there is a clear hierarchy of authority, there is much less need to bridge. Such bridging as there is tends to be performed by the city's chief executive and his chief subordinate for renewal.

In an agency headed by a board, if anyone is to lead in the coordination of urban renewal activities with other groups, including the local government, then it is reasonable to expect that function to devolve chiefly upon the board's chairman and its primary executive. They are not likely to disagree strongly with the majority opinion of the board, and are likely to know the agency's problems and needs in more detail than other board members and to possess more comprehensive knowledge than other subordinates. Accordingly, their views may receive considerable deference from board members, subordinates of the agency, and others who deal with the agency. In some instances, the authority accorded to a strong board with determined leadership may impair the ability of the city's chief executive to coordinate the urban renewal enterprise; and he may even lose control over the board to outside influences. At the same time, the board, particularly through the chairman, may win considerable additional support and exert added influence beyond the confines of city government owing to the board members' joint status as officials and as occupants of other positions in the civic and business life of the community.

The type of LPA is not easily changed. State law may provide no option. And even when it does, there is reluctance to change type of LPA when the existing one is effective or where new litigation would be required to test its powers. This inflexibility of LPA type tends to limit the trend toward a more executive mode of coordination in cities with corporate LPAs. Similarly, of course, a weak-mayor structure of city government may impede the emergence of an executive mode. Aside from these structural limits, there seems to be an underlying long-term trend toward a more executive mode for the enterprise. At the earliest stages in a renewal enterprise, caution impedes legislative delegation of authority to central management. The lack of central control appears to reassure those who fear that unwanted types of renewal might be imposed by a central executive. Perhaps these elements feel safer as long as the agencies conducting different types of renewal must compromise and curry popular favor. Where rather evenly divided groups in the community intensely disagree on renewal policy, an executive mode is often avoided, or is adopted only in considerable controversy. This may be most important in cities where urban renewal is expected to extend over a wide area and where the exact nature

of the future projects is not known. But a number of factors, including the planning process, encourage a more executive mode in the long run.

As ungrounded fears subside, restrictions tend to be withdrawn. State enabling legislation tends to be amended. As a result of this and their greater confidence, local councils become more willing to take responsibility and more willing to delegate authority, and executives more ready to accept it.

More important in the long-run is probably the progressive accomplishment of those renewal projects which are the easiest to achieve without central management. As the areas qualifying for federal aid and appealing strongly to the market are progressively renewed, the remaining areas become administratively more difficult to renew. And market funds may not flow so readily as before. Furthermore, the projects extend closer together and may require coordination of more varied renewal techniques. That is, the need for administrative coordination tends to increase even as the community's disagreements on renewal policy decline.

Neither the support nor the opposition to an executive mode which we noted exists at early stages of the renewal enterprise should be conceived as rooted ordinarily in public opinion. Most people may be unaware or only dimly aware of the issue. The people who participate actively in the enterprise tend to be most important in it. Some accord authority beyond the formal minimum to an executive only as program and procedures are evolved which are acceptable to them. The inspectors who may be chiefly committed to conservation and rehabilitation, but who also make the first contact with property owners in clearance areas, must overcome fear that a centralized operation would neglect conservation and rehabilitation. The housing authority employees who conduct relocation services on contract must overcome fear that a centralized operation might exclude public housing. The organized downtown interests, whose support is necessary in many ways, including, often times, the financing of the work, must overcome fear that a centralized operation would give insufficient emphasis to the surroundings of downtown or would call for public housing on a scale thought by them undesirable. A more executive mode becomes a real possibility as early fears of these kinds are sloughed off by the potential committed active participants.

Contrary to the usual supposition, urban renewal does not tend to conform more closely to the executive mode in large cities. Indeed, it will be recalled that no significant difference was found in this respect among the cities of different size. The level of achievement was higher, however, among the larger cities, while the level of commitment and activity displayed by the city chief executive was higher in the smaller cities. Apparently there is a selection process which attracts small cities to the renewal program only when there is no strong local opposition to renewal, while in large cities, even intense opposition to certain types of renewal does not create a coalition capable of preventing or cutting off the renewal efforts altogether. Possibly a less executive mode has been actually more functional for the renewal enterprise in some large cities by assuring that there will be discussion

and compromise before any particular renewal technique is applied in any specific area.

In those cities which enter the program with less than practically unanimous support, the city chief executive is encouraged to take active and committed leadership, but he may not find it necessary to bring much authority to bear. This would explain the greater commitment and activity without greater leadership influence of the chief executives of the smaller cities.

The greater achievement of the larger cities reported by observers appears to reflect, in part, the greater comprehensiveness of their renewal programs and their greater success in resolving policy differences. The smaller cities which entered the program had a less difficult problem to the extent that they, too, generally agreed on a project. But the observers were not confident that they would continue in the program with additional projects.

VI

TYPE OF LOCAL PUBLIC AGENCY

The chief operating agencies within an urban renewal enterprise, the redevelopment, code enforcement and rehousing agencies, present certain problems in organizing for urban renewal which are explainable in the light of their previous purposes. The three types of LPA utilized in urban development projects differ in their advantages and disadvantages for renewal. The differences were most important in the redevelopment period and in the first years of renewal. The housing and redevelopment authorities had staffs experienced in the fields needed in redevelopment, including relocation, while their unfamiliarity with code enforcement and conservation made it difficult for them to develop a program that would give adequate attention to the potentialities of this form of renewal, and local opposition to many of them made it difficult for them to lead.

The availability of the city machinery for coordination and the established relations to the city's political figures have been points favoring the city LPA in renewal, while their lack of familiarity with relocation and housing has made it difficult for them to develop relocation as an important and integral part of the program.

The redevelopment authorities have been free of fixed public attitudes but have lacked experience. Their formal independence of city hall gave them freedom to develop a fresh approach but threatened to leave them "out of the orbit of power and influence."

In actual practice, the disadvantages of each type have tended to be corrected, although not always soon enough to accommodate local opinion. City LPAs have learned renewal methods. Redevelopment authorities in many cities have proved amenable to central management control and have been brought under city government coordinators or administrators much more often than have housing and redevelopment authorities. Many of the housing and redevelopment authorities have

learned the value of code enforcement. While the housing and redevelopment authorities have remained formally independent of city government almost everywhere, bridging groups have linked them with the city and have built more confidence on the part of business participants in the authorities. Even the corporate independence of the housing authorities, which, it will be recalled, was originally necessary if housing debt was not to be charged to the city's debt limit, can disappear where the state courts accept segregation of funds as a substitute for corporate separation.

In many large cities, the environmental code enforcement agencies have been scattered through the city government, and such agencies have been only rudimentary in small cities. Often, state regulations have been the only ones enforced in the latter. In cities of all sizes, the most vigorous enforcement program has sometimes been lodged in the health department, sometimes in the building inspector's office, and occasionally in a consolidated inspections department. Under the federally aided renewal program, widespread adoption of local housing ordinances, emphasis on area-wide enforcement, professionalization of the staffs, and consolidation or coordination of the chief enforcement agencies have been stimulated. In many cities, the city organization displays signs of reorganization for urban renewal chiefly in respect to the enforcement activities.

VII

THE URBAN DEVELOPMENT ENTERPRISE

Currently, major new downtown rebuilding projects are taking their places alongside the more established neighborhood renewal efforts, and alongside the projects for construction of major transportation routes as the three major arms of a city program for the reconstruction of the urban environment. The reorganization for urban renewal must, therefore, provide for further evolution to accommodate a new enterprise. Not only is a more executive organization likely to be desirable for renewal in the long run, but the renewal organization must accommodate, at least in the largest cities, to coordinating arrangements for urban development as a whole. Staff, coordinating, and planning agencies will eventually be needed at this level in large and complex cities.

Many small cities in metropolitan areas do not tend to reach that point. They may contain no vast terminal complexes and not even border a major new transportation artery. Their whole area may be the size of a single renewal project. They may organize simply for *renewal* as a sufficient preparation for the emerging metropolitan-area-wide enterprise of urban *development*.

The cycle of adjustment of formal organization to enterprise and of enterprise to formal organization is occurring, then, once again. The tide of reform which swept across municipal government during three-quarters of a century fed on revulsion at the graft and corruption in public works as well as in other forms of boodle. As one result, departments of public works were created under professional engineers.

Such departments, ever since, have offered a focus for planning and power to develop an appropriate network of streets and utilities.

As the tide of reform has swept away many of its own sources, and has gradually ebbed, the city governments have continued to evolve under the impact of newer enterprises. Several of these have contributed to the city government structures of today and to the enterprises which now engage the urban communities. To the use of police powers to close or demolish slum buildings was added the public housing enterprise which replaces slum with publicly-financed, low-rent housing. Mortgage insurance was created and freed housebuilders to become mass producers and builder-developers who could develop whole "tracts," including the streets and sewers as well as the houses. Redevelopment constituted a new wave, offering to replace slums with any suitable new land use, public or private. Renewal was originated as another wave, offering a variety of treatments according to the character of the area. Currently we are in the midst of a new wave of programs for downtown reconstruction which utilize the renewal organizations and also the departments of public works and other agencies concerned with transportation routes. And, if I am correct, we are now entering into another enterprise and a new cycle. This is an ambitious one. It is proposed to harness downtown reconstruction, urban renewal, and freeway construction to a grand strategy for governing the major elements in the over-all physical pattern of urban areas.

Because cities do not completely integrate the institutions for each new enterprise with the inherited institutions, one may trace the several stages of the civic evolution in the organizational structure of local government. The evolution may also be observed by comparing cities which entered upon all the successive enterprises with cities where some or all of these have failed to attract the community's interest. Some cities are just beginning to take urban renewal seriously. They may be the ones for whom the study of renewal experience may be most directly useful. Study of past experience may be equally relevant for those cities which have long since entered into a renewal enterprise and are ready for a newer urban development drama—but more to acquire self-knowledge, to see their past as prologue. They must also recognize the differences between renewal and the next enterprise. They must recognize, for instance, that the new enterprises envision the metropolitan areas as a whole, and challenge municipal government, even impertinently demanding its credentials as more than a pressure group within the urban community.

Our study stops short of these questions concerning organization for future enterprises. On the other hand, it prepares us to see organization for urban renewal as a problem for one of a series of "long waves" in civil life, each dominated by one or more major enterprises. Probably in each of these waves there is a phase when line and staff organization on the central management model is the most appropriate model. But an important frontier for administrative theory lies in supplying models

appropriate for other phases, and in testing the effectiveness of the line and staff and other models for the necessary transitions, from phase to phase and from long wave to wave. The job of organization in those periods when the central management model is not acceptable is not to be dismissed vaguely as "politics" and "compromise." A whole course of organizational change is needed which will keep the structure in accord with political necesssities, including the necessity to serve a community's current enterprises.

PROPERTY, ET AL. v. NUISANCE, ET AL.

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The urban renewal program which is being carried out pursuant to federal and state laws by local government bodies throughout the country has conferred extremely broad powers upon urban renewal agencies and local governing bodies. In practically all of the cases that have been decided in both the state and federal courts, including the United States Supreme Court, the power of local urban renewal agencies and governing bodies to decide which areas may be declared unusable in their present state and condition has been upheld by the courts.[1] In addition, practically all of the courts have upheld the right of the local agencies to acquire property which is not itself in a blighted or deteriorated condition, if such property lies within a legislatively determined blighted area. However, it would appear that the urban renewal statutes at both the federal and state levels contemplate that the local urban renewal agencies which acquire property or any interest in property must pay just compensation for such acquisition—that is, they must go through the normal eminent domain procedure. At no point do the federal or state laws contemplate that the local agency shall acquire any property rights without just compensation to owners.

Suggestions have been made that the local urban renewal agencies should be vested with the police power to condemn slum property (much as do various other city agencies, such as police and fire departments, departments of public safety, etc.) which, in the determination of the renewal agency or the local governing body, constitutes a menace to the community as a whole. Since the urban renewal legislation grants such broad powers to local bodies in the selection of areas which are a detriment to the community as a whole, the vesting of a broad police power in such agencies might lead to wholesale appropriation of property without what the courts would regard as due process under state and federal constitutions. In this article, we shall use "condemnation" to mean governmental actions within the "police power"; and for a taking by payment of compensation, we shall use the term "eminent domain."

This article will attempt to deal with the nature of the property rights and interests to be acquired by the urban renewal agency, and a number of approaches to the value of such property rights and interests. Under the theory of the police power, the governmental agency which condemns property—and even destroys property—be-

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[1] *Validity, construction, and effect of statutes providing for urban redevelopment by private enterprise,* Annot., 44 A.L.R.2d 1414 (1954). See also Annot., 44 A.L.R.2d 1414 (Supp. Ser. 1960); Berman v. Parker, 348 U.S. 26 (1954).

cause of the illegal use of such property or because of the possible detriment to the community as a whole by a continued use of such property, acquires no right, title, or interest in the property so condemned or destroyed. The classic example, of course, is the case of a building adjacent to a burning building, and the destruction of the adjacent building by the fire department in order to avoid the spread of the fire to a much larger area in the community.[2] Other examples are the destruction of diseased cattle and other farm animals in order to prevent the spread of contagious animal diseases,[3] the destruction of diseased trees in the vicinity of orchards,[4] and the destruction of personal property[5] and even improvements to real estate such as a home[6] to prevent the spread of diseases.

Thus far, the courts have not been faced to any great extent with the question of whether the elimination of slum structures, which are conducive to unhealthy community life, and even disease and crime, are such nuisances that their elimination by the urban renewal agency without compensation to the owners thereof would fall into the same category as those just mentioned above. Nevertheless, it is worth speculating on whether or not the legislative determination that a certain area is a slum, or blighted, or insanitary, as these terms are used throughout the federal and state statutes, may one day be used as the basis for declaring the existence of slums to be so highly detrimental to the community as a whole that the governmental agency may take such property in the exercise of its police power without compensation for the land thereunder.[7]

The uses to which personal and real property may be put in a private enterprise society are not beyond control or limitation. The question frequently arises, however, as to whether, even if the controls or limitations on use are within the powers of the state, they are of such a nature as to necessitate the payment of compensation to property owners affected thereby? The cases generally hold that every valid

[2] Bowditch v. Boston, 101 U.S. 16, 18 (1879): "At the common law everyone had the right to destroy real or personal property, in cases of actual necessity, to prevent the spreading of a fire, and there was no responsibility on the part of such destroyer, and no remedy for the owner. In the case of the *Prerogative*, 12 Rep. 13, it is said, 'For the Commonwealth a man shall suffer damage, as for saving a city or town a house shall be plucked down if the next one be on fire; and a thing for the Commonwealth every man may do without being liable to an action.' There are many other cases besides that of fire—some of them involving the destruction of life itself—where the same rule is applied. 'The rights of necessity are a part of the law.' Republica v. Sparhawk, 1 Dall. 357, 362." See also Hughes v. United States, 230 U.S. 24 (1913).

[3] New Orleans v. Charouleau, 121 La. 890, 46 So. 911 (1908); Houston v. State, 98 Wis. 481, 74 N.W. 111 (1898); Newark & S. P. Horse Car Co. v. Hunt, 50 N.J.L. 308, 12 Atl. 697 (1888).

[4] Bowman v. Virginia State Entomologist, 128 Va. 351, 105 S.E. 141 (1920); Miller v. Schoene, 276 U.S. 272 (1928); Balch v. Gleen, 85 Kan. 735, 119 Pac. 67 (1911); State v. Main, 69 Conn. 123, 37 Atl. 80 (1897).

[5] Savannah v. Mulligan, 95 Ga. 323, 22 S.E. 621 (1895) (bedding destroyed in scarlet fever case); Rogers v. Barker, 31 Barb. (N.Y.) 447 (1860) (infected clothing destroyed).

[6] Sings v. Joliet, 237 Ill. 300, 86 N.E. 663 (1908) (home containing small-pox germs).

[7] There is certainly precedent on a limited or individualized scale for the summary destruction of buildings whose very existence constitutes an apparent and immediate menace to the health, safety, and welfare of the community. Cummings v. Lobsitz, 43 Okla. 704, 142 Pac. 993 (1914); Houston v. Lurie, 148 Tex. 391, 224 S.W.2d 871 (1949).

exercise of the police power is apt to affect the property of someone adversely.[8] This is well illustrated in the case where property has been rezoned from a higher to a lower use. For example, in an area formerly zoned for one-acre lots for single-family residences, the later rezoning by a city to require three acres for each residence, has been upheld as a proper exercise of the zoning power.[9]

The exercise of the police power, however, sometimes reaches a point where it shades into a taking requiring the payment of just compensation. In the early case of *Pennsylvania Coal Company v. Mahon*,[10] Justice Holmes, speaking for a majority of the United States Supreme Court, stated that a Pennsylvania statute forbidding the mining of coal under private dwellings or streets in cities in places where the right to mine such coal had been reserved in the grant conveying such property was unconstitutional, in that it was a taking of private property without due process of law. The reasoning of the court was based on its conclusion that there is a question of degree of control, which cannot be disposed of by general propositions of law, and that one fact for consideration in determining such limits is the extent of the diminution of use. When the degree of control reaches a certain magnitude, the factual situation must be thoroughly examined to see whether there is, in fact, a taking (even though allegedly pursuant to the police power) which requires compensation to the property owner to sustain the act. And while the greatest weight is given to the findings and declarations of the legislature, interested parties always retain the right to contend that the legislature has gone beyond its constitutional power. The *Pennsylvania Coal* case, while not slavishly followed in all instances since 1922, remains the weight of authority, and has been cited favorably by numerous courts to uphold the proposition that even the exercise of the police power can go but so far, and even agencies purporting to act under the police power may be forced by the courts to take by eminent domain and to pay just compensation in certain factual situations.[11]

In his very able and useful treatise on municipal law,[12] Charles Rhyne sets forth his view of the distinction between the power of eminent domain and the police power. In Rhyne's view, the taking by eminent domain is for the purpose of putting the property taken to a public use by the taking agency—*e.g.*, highways, parks, and schools. On the other hand, under the police power, as Mr. Rhyne views it, property may be destroyed or its value impaired, but in no event is it taken by the condemning public agency for its own use or as that agency's own property.

[8] Oliver Cadillac Co. v. Chirstopher, 317 Mo. 1179, 298 S.W. 720 (1927); Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365 (1926).

[9] Flora Realty & Inv. Co. v. City of Ladue, 362 Mo. 1025, 246 S.W.2d 771, *appeal dismissed*, 344 U.S. 802 (1952).

[10] 260 U.S. 393 (1922), with dissenting opinion by Mr. Justice Brandeis at 416.

[11] "Traditionally, we have treated the issue as to whether a particular governmental restriction amounted to a constitutional taking as being a question properly turning upon the particular circumstances of each case. See Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416." United States v. Central Eureka Mining Co., 357 U.S. 155, 168 (1958).

[12] CHARLES S. RHYNE, MUNICIPAL LAW § 26-3, at 530 (1957).

Even if we follow Mr. Rhyne's line of reasoning, we can arrive at the conclusion that while the urban renewal agency has an unqualified duty to pay an owner just compensation for his property, the urban renewal agency, on the other hand, has no obligation to pay for any illegal use of the property; nor does the agency have a duty to pay for a nuisance, if it can be shown that the property taken does constitute a nuisance and that the improvements have a market value diminished by the cost of remedying the illegal uses or have value that could be ascribed to the illegal uses of the improvements. While the police power would not be the power under which the urban renewal agency would be taking the improvements, if the urban renewal agency is able to show to the court in an eminent domain proceeding that the improvement is a burden rather than a benefit to the land and that the urban renewal agency is taking for its purposes only the land to be sold thereafter for a legal and useful purpose, then it may be possible for the urban renewal agency to arrive at the same results as though it were taking under the police power.

As indicated above, as soon as the area of eminent domain is approached, the courts are faced with the problem of valuation of the property or interests in property taken by the governmental agency. Lewis Orgel, in his *Valuation Under Eminent Domain*,[13] points out that even within the power of eminent domain, there is the possibility of establishing a standard of valuation which would allow a finding of a diminished value, or even no value, for improvements which constitute a nuisance in the sense that they are a detriment to the community as a whole. Mr. Orgel, in discussing "Market Value as Enhanced by Present Illegal Uses," states:[14]

> In a number of cases the courts have stated or held that present market value, based on past illegal uses, might not be considered in making an award of just compensation, although the property has been used for those purposes, and though such use did result in an enhancement of market value. . . .

There are several important questions which must be answered with respect to the urban renewal program and the exercise of the power of eminent domain thereunder. The first is with respect to the effect on value arising from the legislative determination that the area in which the improvement stands is so blighted or deteriorated that it constitutes a menace of great proportions to the surrounding areas of the community.[15] In this sense, it might be said that such a legislative indictment assumes the nature of a contagious disease which, if not eliminated, will

[13] 1 LEWIS ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN § 3, at 17 (2d ed. 1953).

[14] *Id.* at 163.

[15] In cases involving eminent domain proceedings by municipal bodies other than urban renewal agencies, the courts have recognized that long before the actual institution of eminent domain proceedings relating to part of a property, the possibility of such action, shown by preliminary steps or plans or even discussion or rumors, may influence advantageously or disadvantageously the value of the property and its fitness for some intended use. Lansburgh v. Market Street R. Co., 98 Cal. App.2d 426, 220 P.2d 423 (1950). However, in an urban redevelopment case, a court has theorized that this type of situation is a mere incident of ownership of real property, and hence a reduction or increase in the market value of property occurring by reason of legislation authorizing some public project cannot be considered a taking in the constitutional sense. Sorbino v. New Brunswick, 43 N.J. Super. 554, 129 A.2d 473 (1958). See also Danforth v. United States, 308 U.S. 271 (1939).

infect the entire community. But this very legislative determination of blight is usually turned on its head by slum property owners. They say their property has fallen in value due to such declaration. In truth and in fact, it is really the other way around. In most instances, the particular property, and certainly the area of the urban renewal project as a whole, has so deteriorated in social usefulness that in order to stop its contagious spread in other areas (much as in our earlier example of the fire and adjacent buildings), the legislative body of the community has had to call a halt to its continued use and occupancy and declare it to be in the public interest that it be totally destroyed.

Is not this legislative determination of blight, therefore, prima facie evidence that the usefulness and value of all property in such an area has diminished? If that is so, a penalty should be assessed against all property in such an area. In effect, the burden of proof should be on the owner to show that in his particular case, he is without fault, that he has not contributed to the legislatively-determined condition, and that his property is in a legal condition, properly used, and therefore has a market value based on such condition and use. Even if the courts will not go so far, the taking agency should certainly be allowed to pay less for property because of its illegal uses and its greater or lesser contribution to the slum character of the area, which has been declared to be a detriment to the community as a whole.

This question has been before the courts, and a partial solution has recently been enacted into law in Illinois:[16]

> Evidence is admissible as to (1) any unsafe, insanitary substandard or other illegal condition, use or occupancy of the property; (2) the effect of such condition on income from the property; and (3) the reasonable costs of causing the property to be placed in a legal condition, use or occupancy. Such evidence is admissible notwithstanding the absence of any official action taken to require the correction or abatement of any such illegal condition, use or occupancy.

It is suggested that even without the existence of a statute along the above lines, the courts should, and actually have, allowed evidence of illegal uses in condemnation cases. An interesting early case is that of *McKinney v. Nashville*,[17] in which the city condemned a saloon which was being used for gambling purposes; and the court instructed the jury that it could consider only the lawful uses to which the property could be put. The court said:[18]

> . . . and the use of any portion of this property for gambling purposes was in violation of the law. And, if it was true that such illegitimate use did inflate the rental value of this property, then the jury was properly told that a rent inflated by this use, to the extent of the inflation, could not be taken into consideration as constituting a part of the rental value. It is true that it might be a matter of difficulty to determine where the rental value from a legitimate use ended and that from the illegitimate use began, yet that is the misfortune of the owner, for which the city is not responsible.

[16] ILL. REV. STAT. c. 47, § 9.5 (1959).
[17] 102 Tenn. 131, 52 S.W. 781 (1899).
[18] 102 Tenn. at 139, 52 S.W. at 783.

In the areas in which urban renewal agencies operate, there will not necessarily be such clear-cut inflated rental values as that present in the *McKinney* case. However, in urban renewal areas, there are numerous instances of violation of building codes and fire and other safety ordinances of the community.[19] The problem here is not whether these uses have inflated the value, but rather whether the community standard, as evidenced by its codes and ordinances, must be taken as the starting point for determination of values. That is, if a building is below the standard required by codes and ordinances, shall its value be diminished by the amount of money that would be required to bring the particular building to the legally required standard? If we approach the question in this manner, we are merely stating that the community requires all buildings to be up to a certain standard; any deficiencies must be remedied before the building has a *legal* market value; and even if it is sold, it cannot be put to use until it is brought up to the required standard.

The property owner, on the other hand, may, with all good intentions and on the basis of actual sale (and, unfortunately, with some law on his side), show that his property and other properties in similar condition have been bought and sold over the years. This may be true, but it should not influence the outcome; the sale of illegally used property should have no more significance in determining value for purposes of eminent domain than the sale of a gambling debt would have in determining the legally recognizable value thereof. In private contracts between the owners of such illegally used property, steps may be taken by each of them to enforce, privately, their rights as against each other. Should the courts be used, however, in order to enforce the alleged rights of the owners of such illegally used slum property? If all property ownership in slum areas were vested in parties to whom the deterioration of the area could be directly traced, a solution to the above problem would be much easier to discover. Unfortunately, that is not the case.

The classic example, and a very recent one, of what may happen with respect to a property taking in an urban renewal area is the *Mayme Riley* case.[20] This case should be required reading for every urban renewal agency official and every attorney representing such an agency in eminent domain proceedings. The variety of opinion of the various judges in the courts which have heard this case can be easily explained by the fact that most courts in eminent domain proceedings are anxious to arrive at a "fair and equitable" value as just compensation for the property owner. The courts, however, are faced with the same problem as the urban renewal

[19] It is ironical that several of the courts which have invalidated redevelopment legislation in their application to particular factual situations have assigned as one of the reasons the opinion that a slum could be cleared by the exercise of police powers under general laws dealing with zoning, abatement of nuisances, and the preservation of public health. Adams v. Housing Authority of Daytona Beach, 60 So.2d 663, 666 (Fla. Sup. Ct. 1952): "If the only purpose is to remove or abate a blighted area, the police power is ample. Our general laws relating to cities and towns, Chapter 176, F.S.A., with reference to zoning and Section 167.05, F.S.A. with reference to abatement of nuisances and the preservation of the public health confer sufficient power. These provisions of our Statutes have been liberally construed by this Court." See also Opinion of the Justices, 332 Mass. 769, 782, 126 N.E.2d 795, 803 (1955).

[20] Mayme Riley v. District of Columbia Redevelopment Land Agency, 246 F.2d 641 (D.C. Cir. 1957).

agencies—that is, just compensation for Mayme Riley may be a windfall for the absentee owner of multiple parcels in a slum area. Yet, the law must be impartial—at least in theory—may not construct arbitrary classes, and must treat each piece of property like the next. For purposes of illustration, it would be well at this point to set up a hypothetical problem case, based in part on the *Mayme Riley* case as well as on a variety of experiences of the authors with similar fact situations. To avoid confusion, the name of Mary Jones will be used in place of that of Mayme Riley.

The legislatively declared slum area, or at least a part of the area, on which Mary Jones's home stands, will be called "Flower Street." It will be assumed that there are twenty-five row houses on this street, one of which is owned and occupied by Mary Jones. Eight of the row houses are owned by the Excelsior Realty Company, which at various times has owned more or less than these eight houses, and from which company Mary Jones bought her home about ten years ago. Excelsior bought its presently owned eight houses at various times during the past thirty-five years, has owned as many as twenty houses, has sold several, and has foreclosed on several. The eight houses now owned by Excelsior are three-story brick, were built about sixty years ago for single-family occupancy, and are now being used for three-family occupancy, a legal use under the zoning ordinances, provided that certain improvements in plumbing, electrical wiring, and so on, are present.

Mary Jones is widowed and the mother of five teen-age children. She has been employed regularly as a restaurant cook. Her husband's legacy to her, in addition to the children, consisted of a life insurance policy, which, after payment of medical and funeral expenses, left Mary about $500. She learned that she could buy a house from Excelsior for $350 down and that she could have some income from renting part of the house. The purchase price was $8,000, and the $7,650 balance was secured by two deeds of trust at eight per cent interest. Nominal monthly payments, within the earning capacity of Mary Jones, made it possible for her to use most of her rental income of about $600 a year for repairs and additions. During the ten-year period of ownership, Mary Jones spent about $2,000 on heating and plumbing alone. At the date of the eminent domain proceeding, she still owed about $4,600 to Excelsior. The urban renewal agency, basing its action on the appraisals which it had secured, offered her $4,400. Mary Jones set the value of her home at $10,000.

Excelsior Realty's eight houses had cost the company a total of $17,600. Including capitalized additions, the eight houses had a value on Excelsior's books, after depreciation, of $7,200. The houses were in fair condition, but did not have certain of the additions which Mary Jones had put into her home. Imputed rentals for full occupancy were $85 per month, or $1,020 per year, for each house. Excelsior did not dispute the amount of rental income. The purchase of this type of property by real estate dealers was usually on a "wholesale" basis and was priced by real estate dealers in sales to each other on a "gross multiplier" of about four times the gross

annual rental income. The urban renewal agency offered Excelsior $4,000 for each of its houses. Excelsior said that the gross multiplier should be six times the annual rental and that each of the houses, therefore, had a value of $6,000.

If the urban renewal agency had paid Mary Jones $4,400, she would have then still to pay the holders of her deeds of trust an additional $200 to pay off her indebtedness of $4,600. In Mary Jones's view, she would have lost all of her down payment, all of the principal she had paid during the ten-year period of ownership, and all of the amounts she had spent for repairs and additions.

If, on the other hand, the urban renewal agency had paid Excelsior only $4,000 per house, Excelsior would have had a total capital gain of $24,800. Furthermore, Excelsior would have had to pay no immediate capital gain tax on the $24,800 so long as the company invested in similar property within the statutory period set out in the Internal Revenue Code.[21]

Let us now suppose that the urban renewal agency had not been able to purchase any of the above property and had to resort to an eminent domain proceeding. Assume now that the court had awarded Excelsior $5,000 for each of its eight houses, and that it had considered that Mary Jones had put certain additions into her home which were not in Excelsior's houses and, therefore, had awarded her $6,000. Excelsior would probably have been reasonably well satisfied. Mary Jones would still be disappointed since, again in her view, she had been awarded less than her purchase price and no consideration had been given to her for the cost of improvements. In addition, she might not be in a position, financially, to relocate elsewhere. Prices have gone up, she is older, and while certain FHA mortgage provisions might make it possible for her to secure housing equal to her former home at a very low down payment, it would be difficult for her to assume the payment of the mortgage required on such property.

To go from the specific problem back to the general problem mentioned earlier—that is, what may be assessed against the party or parties responsible for the generation of a nuisance, in this case a slum area—can we arrive at a standard which could be employed by the court for the purpose of awarding just compensation to both Mary Jones and Excelsior without infringing on the constitutional rights of either of the above parties? Until the law can arrive at a method for penalizing those parties responsible for the creation and generation and continued use of the slums, there will continue to be in the future, as there has been in the past, a financial reward to dealers in and operators of slum properties, rather than an assessment of damages for the nuisance they have created and the blight they have placed not alone on their own property, not alone on the area in which their properties are located, but on the entire community.

One possible solution to the question of value is to place a wholesale and a retail value upon the above property. If Excelsior as a real estate dealer is able to buy and sell at a certain "wholesale" price (from and to other real estate dealers), then perhaps

[21] INT. REV. CODE OF 1954, § 1033.

that is the fair value so far as the Excelsior Realty Company is concerned. The taking agency should not be required under law to pay more than the value to the owner of property. It is not required, for example, to pay to Excelsior the amount which Excelsior would add to its cost at such time as it sold to Mary Jones, for the simple reason that the sale to Mary Jones is for her use and includes certain financial risks on the part of Excelsior for which it is compensated by an increase in the price of the product sold. On the other hand, once the property comes into Mary Jones's hands, it can be said to have a retail value to her. The only difficulty with the wholesale/retail price solution is that Excelsior may evade this solution completely by selling the property to Mary Jones at the retail price and thereafter taking back mortgages amounting to almost the entire retail sales price. In that event, in an eminent domain proceeding, if the court were to award Mary Jones the so-called retail price, Excelsior would receive as its share of the proceeds—that is, the mortgage indebtedness—more than it would have received had it held the property in the same manner as the above eight houses.

The foregoing is one of several solutions which have been suggested. However, any solution which makes the same or similar property more or less valuable, in the eyes of the court or the urban renewal agency, on the basis of the ownership, on the one hand, by Mary Jones and, on the other, by Excelsior Realty runs right into the problem of how to avoid a windfall for Excelsior Realty in all cases. But in any event, the court should have the power to decide whether, and to what extent, Excelsior Realty (or any other party) is to be held liable for the generation and perpetuation of the slum. One very simple method would be, or would have been, rigid enforcement of all building and safety codes by the proper agencies in the community before the area had degenerated to its present blighted state. That not having been done, is it possible for the urban renewal agency and the court retroactively, in effect, to penalize the owners of property who, while they were under an obligation to maintain their properties at certain standards, were never made to live up to their obligation?

Perhaps the problem may be solved in the following manner, which would in no way violate any constitutional rights, would not be subject to attack as an ex post facto judgment, and which would, at the same time, penalize the individual owner of deteriorated property to the extent that his lack of care has brought about the slum condition which is now capable of being remedied only by a further investment of the taxpayers' funds in an urban renewal project.

In the foregoing example of Mary Jones and Excelsior, it was assumed that the properties were all in the minimum condition required by local building codes and safety ordinances and that they were being operated in accordance therewith. Now let us assume that Excelsior owned one building, which we will use for example purposes, in which a variety of building code and safety ordinance violations existed, such as overloaded electrical wiring and insufficient toilet facilities, which had never been located or cited by the local governmental enforcement agencies. Should this

condition be a penalty assessed against the property in an eminent domain proceeding? If so, how much should be deducted therefor from the value? Should it be the full cost of all repairs necessary to bring the property up to code standards? And if there existed a large number of such deficiencies, could the court arrive at the conclusion that the property had a zero value, in the sense that the cost of such repairs would be beyond the realizable value of the property in the particular slum area in which it was located? To go even further, if the court should arrive at such a solution, would the improvements then have a minus value, in the sense that the court could decide that the very existence of a building constituted a nuisance or such a detriment to the adjoining property that it was necessary to destroy the improvements, and, therefore, the cost of demolition should be deducted from any land value of the property?

Let us assume that one of Excelsior's buildings, which we will call Building "A," has no illegal conditions or uses and that another building, which we will call Building "B," has illegal conditions and uses which would require the expenditure of $4,000 for plumbing, electrical wiring, etc. to bring that building up to the minimum code standard. And let us assume, further, that in spite of the disparity in condition, some of which, of course, is entirely hidden from the renters of such property, both buildings have a rental income of $100 per month. Using for purposes of example five times gross yearly rental as the fair market value of such property, we would arrive at a market value of $6,000 for Building "A" and $6,000 for Building "B." Naturally, the income approach is only one of the methods of arriving at value in eminent domain proceedings; however, it has been our experience that it is a very persuasive method in slum property valuation, since so much of this type of property is sold without great regard for the condition of the property. As a matter of fact, this is one of the reasons why many owners in the position of the mythical Excelsior Realty have failed or refused to make necessary improvements or corrections of illegal conditions and uses. The character of the neighborhood has become so bad that they have found that it is often difficult or impossible to secure more than a certain rent, regardless of their diligence in correcting all illegal conditions and uses.

If we assume further that the very failure and neglect to correct illegal uses have led to the deterioration of the neighborhood as a whole, it becomes possible for the court to state that if Excelsior had lived up to the legal requirement for the use and occupancy of Building "B," the net results to the community might have been a saving of the entire area without the expensive process of urban renewal. The court could then go on to say that Excelsior Realty's failure over a period of years to maintain its property in a legal condition should reduce the value of that property to the extent now required to correct all of its illegal conditions and uses. In that event (and leaving aside for the moment the land value, for which, of course, there will always be a requirement for payment of just compensation), the award to Excelsior for Building "A" would be $6,000, and the award to Excelsior for Building "B"

would be $6,000 less $4,000 (the cost of the needed repairs), or a net award of $2,000. In this way, perhaps, the taxpayers' burden would not be so great; and those responsible in part for the generation of slum conditions would be paying for their years of carelessness and negligence.

Interestingly enough, the example of the hypothetical Excelsior situation of Building "A" and Building "B" also has illustrative use with regard to rehabilitation areas. First, let us examine the end-product desired by urban renewal agencies in rehabilitation areas. If it is merely the upgrading of an area, regardless of whether the present occupants remain in the area, then the area for all practical purposes takes on the character of a reconstruction area. In these circumstances, the purpose of rehabilitation (whether so stated or not) is the clearance of present occupants in the same manner as in a total redevelopment area, to which the former occupants may have little opportunity to return because of the higher rental or sales prices for new housing after redevelopment.

If, however, the purpose of the urban renewal agency's program is to rehabilitate individual homes in order to retain present occupants or to attract new occupants of similar economic means, then the legal process of eminent domain may be employed to arrive at a fair value to such present or prospective occupants. Assume that the Excelsior three-family occupied house we used for illustration is in a rehabilitation area and, in compliance with a comprehensive land use plan for the area as a whole, it is desired to turn it back to single-family occupancy or to allow only a limited area for multiple-family occupancy, based on the feasibility of providing adequate quarters for separate families. Again, as in the earlier examples of Mary Jones and Excelsior, the urban renewal agency would be faced with the problem of "reasonable classes" in the legal sense. Would the agency have to treat Mary Jones and Excelsior in exactly the same manner? It is suggested that there is no such requirement and that the agency has the power to determine reasonable restrictions on use, one of which could be that only owner-occupants would be eligible to purchase homes. The homes so purchased, or continued in occupancy by present occupants, would have such a restriction for the period of the redevelopment plan, usually about twenty-five years.[22]

Assuming the legality and constitutionality of such regulations, the urban renewal agency would then take the following steps with each of the properties, that of Mary Jones and of Excelsior. Assume the urban renewal agency would purchase the Excelsior property for $6,000 for Building "B." The agency would thereafter determine what would be required to be done to the property, in addition to the $4,000 which would bring the property up to minimum code standards only. Assume

[22] This situation has precedent in the cases involving zoning ordinances which attempt to terminate nonconforming uses by a specified date in the future. See cases collected in *Power to terminate lawful nonconforming use existing when zoning ordinance was passed, after use has been permitted to continue*, Annot., 42 A.L.R.2d 1146 (1953). See also cases collected in *Validity of zoning ordinance or similar public regulations requiring consent of neighboring property owners to permit or sanction specified uses or constructing of buildings*, Annot., 21 A.L.R.2d 551 (1950).

that it would cost an additional $2,000 to rehabilitate the interior and exterior, and that with the expenditure of this $6,000 in improvements and additions, the house now has a market value of $7,500, after taking into consideration two additional factors: first, the rehabilitation or reconstruction of all houses on the street and in the project area; and second, public improvements to streets, sidewalks, and so forth, which result in a general upgrading of the area. The agency could then sell the house for $1,500 to an owner-occupant for use by that family alone or for rental of certain stated space in addition to that occupied by the owner, with the requirement that the new owner make the above additions and repairs, which should cost approximately $6,000. Having done this, the new owner would have been enabled to purchase reasonable living quarters for his family at fair market value and within his economic means (assuming his means to be similar to those of Mary Jones).

Had the above procedure been utilized at the time Mary Jones purchased her home, she could have been spared the tragedy which later ensued upon condemnation; and the community could have achieved its objectives at much less cost to the taxpayer. But how do we solve the particular situation of Mary Jones, if we assume the possibility of rehabilitation of her present home? She has been awarded $6,000 by the court. Of this, she owes $4,600 to the holders of her deeds of trust, so that the net payment to her is $1,400. Let us assume that the urban renewal agency requires her, if she wishes to retain the house, to spend an additional $2,000. Thereafter, her home will have a fair market value of $7,500. Yet she has spent a total of $7,750, consisting of these expenditures: down payment, $350; equity payments over the ten-year period, $3,400; repairs and additions over the ten-year period, $4,000. And the repairs and additions currently required by the urban renewal agency will cost her an additional $2,000. Should Mary Jones be compensated, and under what theory of law may she be compensated? While the answer to the first question may be most emphatically "yes," the answer to the second question does not come so easily. Yet there may be a way to arrive at a justifiable solution.

Go back to the example of the Excelsior house sold to an owner-occupant. That house, after rehabilitation, has the same value as the rehabilitated Mary Jones home. The new owner is paying $1,500 to the urban renewal agency and agreeing to spend $6,000 to rehabilitate it. Mary Jones, being required to spend only $2,000 for rehabilitation, should pay the urban renewal agency $5,500. This will then bring her total expenditure to $15,250, less the $1,400 she was able to keep out of the $6,000 award, or a net total expenditure of $13,850. Deduct from that figure a reasonable rental of $500 per year, or $5,000 for the ten-year period during which her family occupied a portion of the home, and the net cost is $8,850—only $1,350 more than the cost of the Excelsior home to its new owner. The urban renewal agency, by selling at $5,000, has already taken a write-down of $1,000. Where will the $1,350 come from, in order to put Mary Jones on an equal footing with her new neighbor?

It would appear to be equitable to deduct this amount from the holders of the deeds of trust, on the theory that such deeds of trust have a market value below

their stated value. Obviously a change in the law would be required to effectuate such a procedure. Legislation restricting and even totally denying the rights of mortgage holders to obtain deficiency judgments has been sustained in the past to relieve the oppressions and hardships incident to the depression-ridden years of the 1930's, and it would seem there is just as much justification for such legislation nowadays to combat the pernicious effects of inflated mortgages which contribute to the existence of community blight.[23]

The unfortunate situation existing today is that mortgage holders in the position of Excelsior, whether or not they have received all the payments on the mortgage, are not reachable by law. And this is so whether or not the origins of blight and deterioration and illegal conditions and uses can be traced back to them. Assuming for purposes of argument that there is a direct corollary between absentee slum landlordism and the existence of blight—or conversely, between the presence of owner-occupiers and the absence of blight—can it not fairly be said that inhibitions on the generators of slums are necessary? The suggestion is advanced that statutes governing conveyancing could be amended to require, along with the traditional warranties, a warranty that the property and improvements thereon contain no illegal conditions or uses; that the improvements on the property are not in violation of any building or safety codes or ordinances; and that if a local governing body subsequently, within a stated period of time, declares the area blighted, and proof is introduced of the violation of any of the applicable building or safety codes or ordinances during the time such property was owned by the vendor, then in that event he will defend, and if unsuccessful, will indemnify and save harmless the vendee from any loss occasioned thereby.

The above solution could have a twofold effect. It would limit the marketability of slum properties and would place the burden of proving absence of blight on the shoulders of those at fault, in either case accomplishing a desirable goal of penalizing those responsible in large measure for the deterioration of the affected properties. It is our opinion that such an agreement could be made binding on bona fide purchasers and assignees of the mortgage. Immunity could not be claimed where an assignee or purchaser has constructive or actual knowledge from the public records, or where he is put on inquiry by reason of suspicious or peculiar circumstances.[24]

There is some analogy possible here with the situation confronting owners or mortgagees of motor vehicles seized for violations of the internal revenue laws relating to liquor. Remission or mitigation of such forfeitures is authorized,[25] provided that the claimant carries his burden of proving that he had at no time any knowledge or reason to believe that the confiscated vehicle would be used in the violation of federal or state laws relating to liquors, and further that he made inquiry of certain specified law enforcement officials as to the record and reputation of the

[23] See 2 GARRARD GLENN, MORTGAGES §§ 155, 156 (1943).
[24] See 59 C.J.S. § 372 (1949).
[25] 62 Stat. 840 (1948), 18 U.S.C. § 3617 (1958).

debtor, who later proved himself to be a liquor-law violator. The failure so to prove does not, of course, extinguish any right of action against the liquor-law violator in such cases, but the real security is gone.

It may readily be seen that these proposals will not alleviate the problem confronting the property owner who has already paid off his inflated mortgage, and the only remedy that suggests itself is for this party to seek relief through equity on the grounds that his contract was unconscionable.

The advent of more comprehensive legislation and, perhaps, of a separate court or quasi-judicial administrative tribunal may be one way of handling cases in urban renewal areas. The problems discussed in this article may very well be beyond solution under the present-day scope of the urban renewal and redevelopment programs. Certainly all of the undesirable social and economic evils which have crept into our land uses over the past half-century cannot be solved within the present framework of urban renewal and redevelopment laws, in spite of the wide powers granted under such laws.

It would appear, however, that existing legislation could be utilized more fully to accomplish the goals desired. For example, the exercise of the police powers has been utilized on a limited scale in some urban renewal fields such as conservation and rehabilitation. Typical of such statutory enactments is the Illinois Urban Community Conservation Act of 1953,[26] which vests in municipalities powers to conserve and rehabilitate substandard areas which are not sufficiently blighted to warrant area-wide clearance and redevelopment. Municipalities are thereby empowered to make necessary repairs to private property where the owner fails to do so and to assert a lien against the property for the costs of the repairs. Conjunctive use of this or other exercises of the police power and the power of eminent domain may make it possible to arrive at more equitable valuations in acquisition programs.

For example, under certain ordinances, an owner may be required to make a substandard building safe if the necessary alterations and improvements can be made at a cost less than fifty per cent of the value. On the other hand, if the cost is fifty per cent or more of the value of the building, the owner may be compelled to remove or demolish it.[27] Perhaps an urban renewal agency in a community having such ordinances should, in particular cases, present evidence that a building falls into the above category and that the cost of necessary repairs would exceed fifty per cent of the total value. Does this not have probative value to show that such building is valueless as it stands? And if so, should the taking of the improvement be considered non-compensable; and, since the building is a burden on the land, should not the award for the land be reduced by the cost of demolition? Certainly the policing agencies would have so considered the building when they got around to inspecting it; and

[26] ILL. REV. STAT. ch. 67½, pars. 91.8-91.16 (1953).

[27] Perepletchikoff v. City of Los Angeles, 345 P.2d 261 (Cal. App. 1959); Soderfelt v. Drayton, 79 N.D. 742, 59 N.W.2d 502 (1953).

merely because they did not do so is no reason to say that the building, as it stands, still has value when it is the subject of an eminent domain proceeding.

Urban renewal agencies may also employ the police powers of the local community as an aid to the powers of such urban renewal agencies. A recent example of such use may be found in the decision of the California District Court of Appeal in the case of *Hunter v. Adams*.[28] The Monterey urban renewal agency asked the City Council to freeze the issuance of building permits in an urban renewal project area for the planning period, which was about one year. The Council passed a resolution to that effect, and the resolution was upheld by the California court as a proper exercise of the police power against the contention of the property owner that there was a taking without just compensation and in violation of the due process clause of the California constitution. This case contains a comprehensive discussion of the continuing growth of the police power in relation to the changing conditions in our society.

Are we approaching, slowly but inexorably, the conclusion that real property in densely occupied urban areas may no longer be used in a manner determined by the whim of the owner thereof, but must be used in a manner and in accord with the needs of the community as a whole? If we are, then the power of eminent domain is evolving and must inevitably arrive at the point where the right of the community is to the land and the right of the owner of land is to just compensation for that land. Beyond that absolute right, the owner has no right to further compensation, unless he can show that he has done no injury to the community by his use or occupancy of the land. If the owner of the land can show that his use and occupancy of the land has benefited or at least has not had a detrimental effect on the community, then there is a value that can be ascribed to the improvements, for which he must receive just compensation. His failure to make such a showing should reduce his entitlement, not absolutely, but on a proportionate basis, as in the cases of comparative negligence. Difficult as this would be of judicial administration, it may be the only manner in which our urban society can control the evils which have been foisted on it by greed and neglect, and which in many instances can be traced to the individuals responsible therefor.

[28] Hunter v. Adams, 4 Cal. Reptr. 776 (1st Appellate Dist.) (1960).

CURRENT PROBLEMS AFFECTING COSTS OF CONDEMNATION†

DAVID BERGER*

Urban blight is neither a problem of recent origin nor one which is confined to the United States. With very few exceptions (notably Billy Penn's "greene country town" of Philadelphia), our cities developed uncontrolled and untrammeled by plan. Especially was this true during the nineteenth century, when cities burgeoned to accommodate and house the expanding economy wrought by the Industrial Revolution. The expansion carried within it the seeds of the twentieth century physical deterioration of our urban centers. As the industrial complex grew to meet the war demands of the 1940's and the frustrated consumer needs of the 1950's, blight began to threaten the very existence of our cities. However, it is not true, as some believe, that society stood idly by while this urban cancer developed.

Society's initial attempts to eradicate urban blight were, indeed, as old as its very existence. The common law of public and private nuisances has been and continues to be antipathetic to deteriorating land usage. Of more recent origin, zoning control, building codes, and federal public housing projects aimed at this target. Nevertheless, these piecemeal attempts proved futile in and of themselves to provide an effective solution. The comprehensive power of government to renew, rehabilitate, and redevelop entire geographical areas within its jurisdiction—complementing effective programs of zoning regulation, building code enforcement, slum clearance, and public housing—was exercised to restore our cities and to prevent further blight. This, then, is the sum of today's tools for effective urban renewal.

Necessarily, comprehensive urban renewal has brought to the fore many new problems both within and without the compass of law. However, some problems are neither new nor peculiar to it alone. Rather, they are encountered at all levels of government and whether or not the concern is urban renewal. One of the latter, the cost attendant to the exercise of the power of eminent domain, is the general subject of this section. Here, the concern is not only how much government will be required to pay when it takes land or property by its sovereign right or pursuant to constitutional or legislative grant, but also the indirect costs that are levied upon government when it operates through traditional condemnation procedures. And it is of relatively minor significance whether the purpose of the taking be for a highway, slum clearance, public housing, industrial development, airport construction, or any other type of project. The question of cost is ever present.

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Implementation of the power to condemn has been, at most, incompletely prescribed by the legislature, despite the fact that nonconsensual property acquisition is one major instance in our society where the private individual is necessarily subservient to the general interest. The property owner has, at best, a limited right to question the general exercise of government prerogative; a more liberal, but nevertheless restricted, right to question the particular taking; and a general right only to question the amount of compensation to be paid for the taking. Inept though it may be at times, the judicial branch of the government has carried the burden of providing a forum in which the individual voice can most effectively be heard.[1] It has had to mold a flexible body of law and procedure to resolve the ever-changing social problems with which condemnation is concerned. This responsibility and its assumption have been well delineated by Judge Roger A. Traynor, as follows:[2]

> More than ever social problems find their solution in legislation. Endless problems remain, however, which the courts must resolve without benefit of legislation. The great mass of cases are decided within the confines of stare decisis. Yet there is a steady evolution, for it is not quite true that there is nothing new under the sun; rarely is a case identical with the ones that went before. Courts have a creative job to do when they find that a rule has lost its touch with reality and should be abandoned or reformulated to meet new conditions and new moral values. And in those cases where there is no stare decisis to cast its light or shadow, the courts must hammer out new rules that will respect whatever values of the past have survived the tests of reason and experience and anticipate what contemporary values will best meet those tests. The task is not easy—human relations are infinitely complex, and subtlety and depth of spirit must enter into their regulation. Often legal problems elude any final solution, and courts then can do no more than find what Cardozo called the least erroneous answers to insoluble problems.

It seems self-evident that blind criticism of existing judicial practices and procedures in this field would be unfair and unworthy of the universally recognized desire of the courts to cope with the problem effectively and justly. A particular solution, unjust in itself, may perhaps prove to be the most equitable solution that can be brought about by judicial action alone. Indeed, without corrective legislation or constitutional amendment, even rudimentary justice may be impossible of attainment.

At any event, in considering costs of condemnation, two areas will be explored here. The first is concerned with direct outlays to be paid by the condemning authority. These comprise, among others, the cost of acquisition, interest on the award, and the right to be reimbursed for legal fees. The second involves the

[1] It is, of course, true that the redevelopment laws passed by virtually every state provide for notice and opportunity to be heard prior to the formulation of the plan of redevelopment. In most jurisdictions, citizens and property owners have the additional right to appear before the legislative body of the city or other governmental unit to express objections to the plan. However, it is obvious that only a judicial arm can make the binding determination in the case of a contest over the amount of compensation which should be paid to the individual property owner (which the great majority of the disagreements involve), or can give effective relief in the event of an unfavorable decision at a political or administrative level with respect to the project itself.

[2] Traynor, *Law and Social Change in a Democratic Society*, 1956 U. ILL. L. F. 230, 232.

indirect costs levied upon government through the utilization of either the traditional condemnation or the more recently developed quick-taking procedure.

I

DIRECT OUTLAYS

There are several methods for judicially determining the proper amount of compensation to be paid a landowner when property is taken for public purposes. When the objective is total acquisition, resort is commonly made to either one of two tests to determine the market value of property. The first centers on value of the property for its "highest and best use." The other utilizes "replacement or reproduction cost," where market value cannot be clearly ascertained. When the issue in the litigation is severance damages arising from a taking of a portion of property and not total acquisition, the "before and after value" test has almost universally been applied.

It is obvious that some time must elapse between the actual taking and the receipt of compensation, regardless of the criterion for determining value. Consequently, many problems arise concerning what, if any, interest on the basic award should be allowed. As a result of enabling legislation in a few jurisdictions, the court is permitted to charge the *condemnor* with the property owner's attorneys fees[3]—the amount of which may, of course, give rise to controversy.

The presence of these and many other types of controversies substantially affects the ability of a condemning authority to anticipate with any degree of certainty the amount it will be called upon to pay. As a result, in numerous instances where the cost of property acquisition is likely to be the determinative factor in the net project cost, government is hampered and, indeed, ofttimes frustrated because it cannot ascertain the financial feasibility of a proposed project.

Left to their own resources, some courts have, when faced with these problems, seemingly succumbed to pressures markedly inconsistent with both logic and public welfare. The following analysis of some recent relevant decisions in these areas highlights the judicial failure to achieve even, in the Cardozian phrase, "the least erroneous answer to insoluble problems."

A. Highest and Best Use

The general principle is that proposed land uses which are higher and better than those presently existing are a legitimate basis for evaluation, provided the use is not too remote or speculative. However, the danger is obvious. Judicial recognition of anticipated use as a factor in determining damages opens the door to exorbitant valuations by the "expert" witnesses. It does not follow that valuation must, therefore, be restricted to a consideration of present use. In that instance, the

[3] See, *e.g.*, FLA. STAT. ANN. §§ 73.16, 74.10 (1943); N.C. GEN. STAT. § 160-456(9) (1959 Cum. Supp.). *Cf.* ILL. STAT. ANN. ch. 67 ½, § 188 (1959); MICH. COMP. LAWS § 213.89 (1948); MISS. CODE ANN. ch. 3, § 2775 (1956). In the absence of specific legislation, the question arises as to whether the court has equitable power to reimburse any of the property owner's legal expenses.

cure would likely be more inequitable to the individual than the present system can ever be to the condemning authority. But it does emphasize the duty on our courts carefully to scrutinize proffered evidence on anticipatory uses. Unfortunately, many courts have rejected this responsibility.

In *Town of Slaughter v. Appleby*,[4] suit was brought against certain landowners to expropriate from them a right-of-way in order to construct a road and to install gas and water lines across their land. The right-of-way traversed a 250-acre plot dividing it into two parcels, one of which contained thirteen acres and the other 237 acres. At the time of the taking, the land was used solely for grazing purposes. However, at the trial, the property owners were permitted to present expert testimony that the land in question could be utilized for home sites. Further, if it were so utilized, its value would be about eight times the value in its present use. Even though no evidence was presented showing a reasonable prospect that, absent condemnation, the land would have been used for this value-enhancing purpose, the Supreme Court of Louisiana upheld an award based on development for homes.

A similar result was reached in *Kentucky Department of Highways v. Wilson*[5]—another instance in which a seemingly exorbitant award was upheld. The property sought was seven acres of a thirty-seven acre tract. The lower court approved an award valuing the acquired property at three times the value of the remaining thirty-acre tract. Furthermore, this disproportionate valuation did not include residential improvements on the smaller tract. On appeal, the Kentucky Court of Appeals upheld the award by reason of evidence that the land taken had a prospective commercial value, despite the fact that the prospects for its commercial utilization were entirely remote.

In *City of Wichita v. Fitch*,[6] the Supreme Court of Kansas also upheld a valuation based upon a remote anticipated use. The property condemned was taken by the City's Park Commission in order to provide a municipal beach and recreation area. Prior to the condemnation, the owner had unsuccessfully attempted to have his land rezoned in order to permit his own operation there of a park. Despite the prior denial of rezoning, evidence of the tract's value as a recreation area was presented at the subsequent condemnation proceeding and an award was made on this basis. On appeal, the award was affirmed, the court noting that the inability of the prior owner to gain a commercial zoning classification prerequisite for a private park was not determinative since the municipality had itself condemned the land for use as a park. The import of this decision seems to be that the use which the condemning authority plans for the acquired property is properly to be considered in the condemnation proceeding, regardless of any actual prospect of private achievement of this use. These cases represent the most liberal approach in permitting evidence of remote anticipated uses to determine value. Other decisions range a broad spectrum in so far as liberality to the property owner is concerned.

[4] 235 La. 324, 103 So.2d 461 (1958).
[5] 317 S.W.2d 490 (Ky. 1958).
[6] 184 Kan. 508, 337 P.2d 1034 (1959).

An example is *United States v. Jones Beach State Parkway Authority*,[7] decided by the United States Court of Appeals for the Second Circuit. State-owned land adjoined a United States Air Force facility. At the time of condemnation, the land was used as a landing approach by the adjacent air field pursuant to existing federal easements. However, ownership in fee was deemed necessary. The base value of the land, before any depreciation due to the easements, was higher in residential use than it was in its use by the state for park purposes. However, the easements virtually precluded residential use and made the land almost valueless for that purpose. But the easements did not interfere so greatly with park use, and for that use the land apparently retained considerable value. Thus, the condemning authority was in the unusual position of favoring the land's highest and best use as the basis for an award, since the cost of acquisition would be less by reason of the existing federal easements. The court held that value of the land could not be based on its present use for park purposes, because no evidence was introduced showing that this use was also the highest and best use. Indeed, the state's own evidence of value disputed its contention and supported the position of the condemning authority that the best use was residential. The court ruled that since the easements had so completely depreciated the land's value for this best use, the compensation now allowable to the state for its land would be limited to the remaining value of the land *for residential purposes.*

In Re Omaha Public Power District[8] is another decision similar in impact to *Jones Beach*. The Omaha Public Power District sought to condemn an easement for a transmission line. Only a corner of the land was to be traversed by the line, and less than half an acre was to be taken for the Power District's right-of-way. The trial court instructed the jury to consider any use to which the land was adapted, and for which it might be used either then or later, having regard to what "may reasonably be expected in the future." On appeal, the Supreme Court of Nebraska held this instruction constituted prejudicial error, since it failed to limit the future uses which the jury could consider. According to the appellate court, "the time element is an important one and it must be limited to the immediate future."[9]

In *Southern Amusement Company v. United States*,[10] the federal government instituted condemnation proceedings against a tract of land contiguous to another tract of land on which a drive-in theater was located. At the time of condemnation, the two parcels—although under the same ownership—were not complementary to each other either in existing or contemplated use. Nevertheless, at the trial, the corporation which owned the property attempted to introduce evidence that as a result of the condemnation, it would be unable in the future to enlarge the existing drive-in theater so as to make it comparable in size to the norm in the trade. On appeal, the trial court's refusal to admit the proffered evidence was challenged. The court of appeals, in affirming, held that the proffered evidence was merely a specula-

[7] 255 F.2d 329 (2d Cir. 1958).
[8] 168 Neb. 120, 95 N.W.2d 209 (1959).
[9] *Id.* at 124, 95 N.W.2d at 213.
[10] 265 F.2d 34 (5th Cir. 1959).

tive estimate of what the theater would bring on the open market if offered for sale with the extra acreage—that acreage being the tract which was being condemned—in contrast to its value without the same acreage.

This case calls to mind the following hypothetical situation. Assume that condemnation is proposed of an urban tract of land zoned for single-family dwellings on one-acre plots. The condemning authority proposes to utilize the tract, presently lying fallow and undeveloped, for a public housing project in which high-rise structures and attached housing will be built. The private owners had not, previous to the condemnation proceeding, evidenced any intent to develop the land pursuant to existing zoning, let alone develop it for attached dwellings or apartments after appropriate action to obtain rezoning. Assume further that the tract is contiguous to a fully-developed attached housing urban area, and that the purpose of zoning this area for single-family residences, which includes the condemned tract, evidently was to insure a high-quality future residential development. Then, should the owner be permitted to present evidence that the highest and best use of the land would be other than that presently permitted by the applicable zoning regulations?[11]

No meaningful contention can be made that the private owner should be restricted to compensation commensurate with the instant land use—namely, undeveloped and fallow property without housing and without agricultural value because of its size and location. Evidence of prospective use is clearly a proper matter to consider in determining value; and condemning authorities, in cases like the hypothetical one, have considered prospective use in determining the value of the tract with regard to the financial feasibility of the proposed project. But the question remains—where is the proper line of demarcation for future uses?

Because the condemned tract is contiguous to a fully-developed urban area, its potential residential use is properly considered. However, effective zoning restricts its residential use to single-family dwellings on one-acre plots. It would be most unlikely that the owner could obtain a requisite zoning variance enabling his potential development of attached housing. The condemning authority, on the other hand, proposes construction of this very type of housing; and its program will render it more difficult for landowners to develop any nearby property consistent with the existing single-family zoning classification. Consequently, in the future, it is more probable that owners adjacent to the condemned property will succeed in obtaining the requisite variances for construction of attached housing—and this, in turn, will tend to increase the values of the adjacent lands.

Both the government and the individual are placed in anomalous positions. If this is the only tract taken, other owners in the area will benefit by the resulting increase in property values. However, if the tract is not taken and no other is substituted, neither this owner nor any other would reap such a benefit. In other words, if the government should not construct this public housing at all, the owner has, at

[11] At first blush, this hypothetical case is similar to *City of Wichita v. Fitch*. However, it differs in that in the hypothetical case, no zoning had been requested or denied.

best, a slight chance to gain approval of attached housing that will increase his land values—so slight, in fact, that its remoteness is clear. Thus, solely by reason of government action, the cost of condemnation would be increased if valuation were based on this prospective, more valuable use.

It would not seem proper to impose a penalty upon the condemning authority for government action laudable in purpose and beneficial to all. In such circumstances, attached residences should not be a proper anticipatory use. The private owner, nevertheless, obtains the full value to which he is entitled. The fact that other property owners ultimately may benefit is immaterial, for they do not benefit at his expense. Indeed, only if this owner can persuade the condemning authority to choose another tract in this area instead of his, could he in any way expect to be the recipient of this benefit. Therefore, the anticipatory use should be held too remote as a matter of law.[12]

Using this analysis as a springboard, we may profitably return to the decisions previously cited. In *City of Wichita v. Fitch,*[13] the situation is much the same as that in the hypothetical case. It seems clear that holding the future use not to be remote is unjustifiable. Moreover, in *Fitch,* the private owner's application for a requisite zoning variance had been denied.[14] In *Kentucky Department of Highways v. Wilson,*[15] while the award was exorbitant and based on an erroneous determination that the prospective use was not remote, there was some evidence which justified this use as a proper basis for valuation. Conversely, in *Southern Amusement Company v. United States,*[16] the court may have unduly restricted the landowner. At least from a mere reading of the court's opinion, it does seem that some of the evidence which was offered but excluded was relevant to prove requisite intent to make the highest and best use of the land condemned.

Very few opinions display that depth of analysis necessary for an orderly determination of whether a particular future use is remote. This is a fault which cannot be cured by legislatures; it is for the judiciary to respond to the demand for thinking in depth in order to solve this admittedly difficult problem. And once this judicial responsibility is discharged, not only will the individual be assured that he will receive his just due, but government will be more able to project with reasonable certainty outlays needed in prospective projects.

[12] If a decision is to be made that a future use is too remote for proper consideration, the only effective agency to assume this responsibility is the court itself. Remoteness must be decided by the judge as a matter of law. To admit all evidence subject to a limiting jury restriction is futile.

[13] See note 6 *supra.*

[14] The only justification for the decision in *Fitch* that could be presented does not appear in the reports. If the zoning request by the private owner had been denied because of the announced intention of the condemning authority to take over the land, *Fitch* would stand on a better footing than the hypothetical. This is so because the application for the variance would be some proof that the owner had reasonable prospects for this anticipated use.

[15] See note 5 *supra.*

[16] See note 10 *supra.*

B. Interest on the Award

Commonly, appreciable delays occur between the time of the taking and the payment of compensation. Most frequently delay is occasioned because the private owner contests the amount of compensation due. But the right to question *ex parte* property valuation by government is basic in our society. No penalty, therefore, should be or is levied on the individual. Additional compensation is proper for the resulting delay in receipt of compensation. Of course, further expense is levied upon the condemning authority by reason of these interest charges. Indeed, protracted litigation frequently results in substantial land cost increases, on which huge interest payments must be made.

Legislative reaction to high condemnation costs, in part due to interest charges, has occasioned widespread action. Some jurisdictions enacted comprehensive quick-taking procedures with depository provisions and thereby averted much of the interest payments theretofore extracted from government.[17] Other jurisdictions have more recently and more restrictively enacted depository provisions.[18] Nevertheless, many problems remain, although, perhaps, they are not quite so crucial.

In *State v. Fisher*,[19] the New Jersey Highway Department had acquired a tract of land in 1940 pursuant to an immediate-taking procedure. However, not until 1956 did the state institute condemnation proceedings. The initial award fixed compensation at a figure which "included therein use by the State."[20] An appeal was taken by the landowners to compel the payment of interest on the award from the date of the actual taking until commencement of condemnation proceedings. The court, in denying relief, held that since the award included an amount for use by the state, an award of interest would be improper because it would grant a double allowance for the owners' deprivation.

Obviously, an award including both the value of the use of the property by the condemning authority during the interim period and interest for the deprivation to the private owner of the basic compensation award is, at least, double compensation. However, that conclusion in no way serves as a justification for the result reached in *Fisher*, for the court permitted an award seemingly commensurate with the value of the governmental use of the property. Yet, the loss occurs to the owner. And the loss is not in regard to the deprivation of his use of the property pending payment of compensation, but rather is in regard to the delay in his receipt of the proper compensation. It, therefore, is a pure monetary investment loss. Indeed, consideration of the value of the land use after the taking and pending payment to the owner—whether use by the condemning authority or hypothesized use by the owner—is totally irrelevant.

Most courts recognize the obvious propriety of considering solely the loss of

[17] See, *e.g.*, Federal Declaration of Taking Act, 46 Stat. 1421 (1931), 40 U.S.C. § 258 (1958).
[18] See, *e.g.*, PA. STAT. ANN. § 18001 (Supp. 1959).
[19] 54 N.J. Super. 274, 148 A.2d 735 (1959).
[20] *Id.* at 279, 148 A.2d at 739.

interest. In *De Bruhl v. State Highway & Pub. Works Commission*,[21] the Supreme Court of North Carolina declared that property owners are entitled to an award including interest at the legal rate of six per cent from the date of the taking.[22] However, the impact of this rigid ruling leaves much to be desired. The legal rate, being static, more often than not fails adequately to reflect the amount the individual lost by not having available for investment an amount of money equivalent to the basic value of the property taken. On the other hand, the commercial rate of interest which prevailed at the time of the taking does seem truly reflective of the loss. Of course, if it is utilized, an additional burden, that of computation, is placed upon the court, but that factor should not be determinative.

A recent decision by the Supreme Court of Pennsylvania[23] may present a solution of striking practicality. The state had condemned land for highway purposes; and at the trial, it had requested a jury instruction that an award might be made on any rate of interest and not necessarily the legal rate. The trial court denied this instruction, and an award was made containing interest at the legal rate of six per cent. On appeal, it was contended that the refusal of the lower court so to instruct the jury was prejudicial error. The Supreme Court held that the legal rate of interest was not the unalterable rule in condemnation awards and, further, that an award was proper if based on the commercial rate of interest. However, there exists what amounts to a presumption that the legal rate is proper, although any party can present evidence that an interest award should be made at another rate. Nevertheless, the burden is on the proponent to prove that the legal rate is not reflective of true loss.[24] As a result, unless an evidentiary contest arises, the court is unencumbered in its determination of the proper interest on the basic award.

C. Severance Damages: Single Ownership of Two or More Parcels of Land

In principle, the measure of damages when only a portion of a single tract is condemned is the difference in its value before and after acquisition. However, often the right to severance damages arises in the context of a question whether an owner of two or more distinct tracts of land is entitled to compensation for damages to the remaining property. Theoretically, if a unity of use exists between the two or more parcels, the owner should be entitled to severance damages to the same extent that he would if a portion of a single tract had been taken. Nevertheless, several recent decisions on this issue reveal a lack of uniformity in judicial analysis. Moreover,

[21] 247 N.C. 671, 102 S.E.2d 229 (1958).

[22] The Supreme Court of North Carolina, in Winston-Salem v. C. H. Wells, 249 N.C. 148, 105 S.E.2d 435 (1958), further clarified the right of a landowner to six per cent on the award from the date of the taking.

[23] Waugh v. Commonwealth, 394 Pa. 166, 146 A.2d 297 (1958). In this decision, the court held that the state did not present sufficient evidence to justify the jury's considering other than the legal rate.

[24] A further criticism common to *Fisher* and *Waugh* is that the award did not specifically determine the amount of interest. Rather, there was a general award which included in *Waugh* a legal rate of interest and in *Fisher* no interest, but rather an amount commensurate with the state's use of the property. No hardship will be caused by specific findings of the amount of the basic award and the interest thereon.

they portray ofttimes muddled thinking regarding what constitutes a unity of use and who should make that determination.

In *Ives v. Kansas Turnpike Authority*,[25] the Kansas Supreme Court was presented with the issue of whether severance damages were allowable to an owner of two rural tracts of land lying one mile apart. The owners had used the two tracts as a unit for more than seventeen years prior to the condemnation. But as a result of the taking by the turnpike authority, unified use could no longer be continued. The court, while acknowledging that the distance between the two tracts was an important factor, held that even where two or more tracts of land under single ownership are not contiguous or physically connected, they can, nevertheless, be considered as a unit for the purpose of assessing damages, provided the uses to which the tracts have been applied are so inseparably connected that the taking of a portion of one, in fact, injures the other.

The Supreme Court of South Dakota[26] set forth different language as to what constitutes a unity of use. Once again, both parcels of the land in question were rural. The court held that noncontiguous tracts of land in single ownership constituted one distinct parcel of land for the purpose of assessing damages if both parcels were subject to a coordinated and uniform use.

However, the Court of Appeals for the Ninth Circuit seems to have imposed an additional test to determine a unity of use. *Cole Investment Co. v. United States*[27] concerned two tracts of land, one of twenty acres and the other of one hundred acres, the latter being the one condemned. On the smaller tract, the owners had dug a well, laid some pipe, and installed a pump for the purpose of irrigating the other land. The court, affirming the denial of severance damages with respect to the smaller tract, held that there must have been, in fact, a unity of use of the land taken and the land remaining and that the market value of the remaining land must have diminished as a result of the condemnation. Here, since the well had not been completed at the time of condemnation—although extensive construction had commenced and costs therefor had been experienced—there was only a planned unity of use. Further, since the owner had not presented evidence of a decrease in market value, but only loss of business opportunity, he had not sustained his burden.

This decision is, of course, distinguishable from both the *Kansas Turnpike Authority* and the *State Highway Commission* cases. In *Cole Investment Co.*, the court was concerned with a use which at the time of condemnation was not in sustained operation, whereas the other cases dealt with long-standing coordinated operations of both tracts. In *State Highway Commission v. Bloom* and in *Ives v. Kansas Turnpike Authority*, the language used by the courts varied greatly in describing "unity of use." However, the difference does not seem to be material or to represent a real divergence of opinion. Neither is harsh to the claimant or to the condemning authority. And each within its factual context seems correct.

[25] 334 P.2d 399 (Kan. 1959).
[26] State Highway Comm'n v. Bloom, 93 N.W.2d 572 (S.D. 1958).
[27] 258 F.2d 203 (9th Cir. 1958).

Furthermore, the pronouncement of the court in *Cole Investment Co.* that a mere planned unity of use should not be considered does not seem erroneous. However, the court seems to have erred in stating there was a second, purportedly independent test—whether the market value of the remaining land has been diminished by the taking. And the application by the court of its criteria to the facts of the case was unduly harsh to the private owner. The Cole Investment Company not only had planned a well, but also it had commenced construction and experienced substantial expenses in pursuit thereof prior to the time of the condemnation. On this basis, the pronouncement by this Court of Appeals leaves much to be desired, since the owner had suffered a recognizable loss.

All of these "severance" cases concerned rural tracts of land. The same problem, however, does arise in an urban context. An interesting situation was presented to the Supreme Court of Pennsylvania in *In re Elgart's Appeal*[28] with regard to distinctly urban tracts of land. Two tracts of land in Philadelphia were contiguous and fronted on a commercial street. One of them contained a multiple-family dwelling, while the other was unimproved. The undeveloped tract was condemned, and the owner appealed from a decision of the trial court which denied him severance damages for the remaining tract because there was no unity of use between the two tracts. The court rejected the unity-of-use test for contiguous properties and emphasized that "there is a recognized economical advantage in larger real estate holdings. Substantial sums are paid by developers for the acquisition of larger plots of land because the advantage of contiguous lots is always reflected by a larger square foot value."[29] The contiguous plots involved in *Elgart* were in a commercially zoned area. Further, there was evidence offered at the trial that an increase in size of such a tract increased value more than proportionately. Thus, it seems that the Pennsylvania Supreme Court merely reflected obvious economic facts of life when it permitted severance damages to the owner.[30] Since urban property was involved, it is not entirely clear that the rejection of the unity-of-use test would be extended to contiguous rural tracts. The court made no explicit distinction along these lines.

[28] 395 Pa. 343, 149 A.2d 641 (1959).

[29] *Id.* at 347, 149 A.2d at 643.

[30] It must be remembered that the unity-of-use doctrine is a "two-way street." Many times its invocation can only benefit the private owner. However, a recent Delaware case shows the converse, and its utilization was to the condemnee's marked disadvantage. In 0.089 of an Acre of Land v. State, 145 A.2d 76 (Del. 1958), a portion of a single tract of land fronting on a highway was condemned. On that portion of the property not condemned, the owners operated a motel. The portion condemned was undeveloped. At the trial, the private owners testified that they had not built on the condemned portion because of a desire to utilize it in the future for commercial purposes such as a gasoline station. However, witnesses for the condemning authority testified that the condemned portion was not desirable for commercial purposes because such use would have an adverse effect on the value of the uncondemned portion as it was then being used. The private owners appealed from an award, their basis being a refusal of the trial court to instruct the jury to consider the property as two distinct parcels. The Supreme Court of Delaware, in affirming the lower court, held that compensation could not be allowed the landowner on any unimaginable, unnatural, or theoretical division of the property when it was not so divided.

D. Impairment of Access

Again, there is a distinct absence of decisional uniformity as to whether severance damages are permissible for an impairment of access. The problem usually arises in this context: A commercial property fronts on a highway which either is changed to a limited access highway or is left untouched, while parallel to it a new superhighway is constructed which diverts much of the traffic theretofore using the older road. In both instances, the abutting land owner suffers through a reduction of traffic. In recent years, the courts have tended to hold that an abutting land owner does not have a property right or interest whereby the state is compelled to maintain either a road or its traffic under a threat of damages. Nevertheless, the marked divergence in judicial view is sharply demonstrated by two recent decisions, one in Florida and the other in Kansas.

In *Riddle v. State Highway Commission*,[31] the Supreme Court of Kansas was faced with a claim for damages by a motel owner who abutted on a highway, the traffic of which had been diverted to a new limited access highway. The court held that, although an impairment of access is not an independent basis for assessing damages, it is correct for a jury, in determining the value of property taken, to consider this element because it would affect the market value which the owner could realize in a private sale. Since a portion of the motel owner's property was being condemned, he was entitled to impairment of access damages.

In contrast, a Florida District Court of Appeal[32] has recently emphasized, when considering whether a land owner, part of whose property has been condemned, is entitled to compensation for traffic diversion, that the state has no duty to any person to send public traffic past his door. Whether or not the abutting owner has any of his land condemned for the new highway is immaterial. In no event should he be entitled to impairment of access damages.

It is difficult to justify the distinction drawn by the Supreme Court of Kansas between private owners whose land has been condemned and those whose land has not been taken. A further question to be considered in this context is whether a property owner, a portion of whose land is condemned, should be compensated because the value of the remaining tract will be further reduced, since the project to be constructed represents a "hazard."

Many recent court decisions have dealt with claims for severance damages based on the fear or anxiety induced by the nature of the public use for which a portion of the land has been condemned. Such hazardous uses include gas transmission lines,[33] high tension lines,[34] guided missile sites,[35] and others.

The decided trend of the courts when dealing with this problem has been to permit an award of severance damages. The reasoning of the Supreme Court of

[31] 339 P.2d 301 (Kan. 1959).
[32] Jahoda v. State Road Dep't, 106 So.2d 870 (Fla. 1958).
[33] Northern Indiana Pub. Service Co. v. Darling, 154 N.E.2d 881 (Ind. 1958).
[34] Hicks v. United States, 266 F.2d 515 (6th Cir. 1959).
[35] United States v. Chase, 260 F.2d 405 (2d Cir. 1958).

Indiana in *Northern Indiana Public Service Company v. Darling*[36] best summarizes the judicial thinking on this point. The issue in that case concerned the fear engendered by the laying of a gas transmission line. Evidence was adduced at trial that during the winter when the ground was frozen, if a leak in the gas line developed, it could travel through the ground and endanger the improvements on the remaining tract. The court considered this fear judicially cognizable and compensable.

However, there is a pronounced judicial reluctance to permit severance damages for an unproved or remote fear. The fact that the condemned property may at some future time be used for a purpose causing anxiety is not relevant.[37] Further, the courts have usually hesitated to classify a project as a "hazard" without a clear showing of immediate danger.[38]

The policy behind the decisions dealing with fear and anxiety should apply with equal force to the impairment of access cases. Government should not be specially burdened because of what it does in the public interest. Owners of property adjoining that taken and used by the government must normally accept the consequences which are general to all. And if a general economic loss is suffered because of the nature of the government improvement, no compensation should be awarded on that account specially. When the nature of the project imposes a peculiar burden upon the individual, compensation may be proper. But without a clear showing of specific danger or harm—not merely a general economic disadvantage—compensation should not be allowed.

E. Reimbursement of Attorney Fees

Without express legislative grants, attorney fees are made no part of an award in condemnation proceedings. And only a few states have enacted statutory provisions permitting the reimbursement of attorney fees by the condemnor.[39] Within the states permitting such awards, several problems have arisen. Should the determination of the amount of the award for attorney fees be a matter of law or of fact?[40] Are expert witness fees to be included in the determination of the proper amount of legal costs expended?[41] Since these problems are not of broad scope, extensive discussion here seems unwarranted.

However, the fact that some jurisdictions have enacted legislation providing for the reimbursement of attorney fees brings to the fore once again the basic propriety of the inclusion of this cost as a part of the award in condemnation proceedings. Since we are here dealing with the issue of the propriety of an award intended

[36] 154 N.E.2d 881 (Ind. 1958).

[37] United States v. 69.67 Acres of Land, 152 F. Supp. 441 (E.D.N.Y. 1957), *aff'd sub nom.* United States v. Chase, 260 F.2d 405 (2d Cir. 1958); United States v. Kooperman, 263 F.2d 331 (2d Cir. 1959).

[38] In United States v. Chase, *supra* note 37, the court, while permitting damages because of a guided missile site, restricted the damages so as not to include severance damages by reason of barracks to be constructed on the land.

[39] See note 3 *supra.*

[40] Seban v. Dade County, 102 So.2d 706 (Fla. 1958).

[41] *Re* Petition of Detroit Edison Co., 87 N.W.2d 126 (Mich. 1957).

meaningfully to reimburse legal costs expended by private owners, it is necessary to recognize that the granting thereof may materially increase the total cost of acquisition.

To place our analysis in a better perspective, it seems best to utilize the hypothetical case. As will hereafter be discussed, condemning authorities rarely if ever attempt to acquire property by court action without first directly negotiating with its owner for amicable purchase. Assume that the *X* Redevelopment Authority desires to acquire ten square municipal blocks in *X* City for a project. The area sought is residential and, for the most part, in a blighted condition. The Authority's appraisers value the individual parcels, and then the owners are contacted. Some individuals—foreseeing a losing and costly battle if they should protest—come to terms quickly. However, the fat is in the fire once the proposed project is made public. Local real estate agents hastily contact many property owners and become their representatives. To a lesser extent, some individuals retain attorneys to represent them in the negotiations.

Normally, whether the representative is an attorney or real estate agent, the fee arrangement is one of two kinds. First, it may be a percentage, say ten per cent, of the final acquisition price, regardless of whether counsel is successful in obtaining a more advantageous valuation. Secondly, it may be a percentage, normally as high as fifty per cent, of the difference between the initial offering price and the final acquisition price.

Because, however, *X* Redevelopment Authority is cognizant not only that amicable purchase is a matter of bargaining, but also that many of the individuals will be represented by persons earning a fee, it has considerable incentive to make its first offer at less than the true valuation of the property. As a result, those condemnees who are unrepresented are placed at a marked disadvantage. They are offered less than just compensation for their property by the Authority, and they are without the tools to represent themselves meaningfully. In this event, to obtain just compensation, they must retain counsel. Even then, because of the counsel fee involved, either the condemnee will receive a net award constituting less than just compensation or the Authority will pay more than just compensation in its gross award.

The probable effect of permitting the recovery of legal costs is to foster litigation in condemnation. However, one must recognize that even without reimbursement of legal costs, substantial litigation does occur in the first instance. For example, in Philadelphia, Boards of View determine value in the great majority of governmental takings. The only new litigation that will be fostered is that which may occur with those who would not have formally contested at the outset the condemnor's amicable offer. However, continuation of litigation by the appeal of Boards of View determinations is less likely when legal costs are unreimbursed. Absent such reimbursement, condemnee's counsel normally charge on a percentage basis. And they are instrumental in terminating the judicial conflict, for litigation soon reaches—to their pocketbooks, at least—the point of diminishing return.

Therefore, upon analysis, it seems that a determination of the propriety of reimbursing legal fees depends upon the relative balance between two contrasting and yet crucial factors. The first is the importance to society of assuring that those few individuals who normally would not obtain counsel will receive a net award commensurate with just compensation. In contrast to this, is the importance of coercive factors preventing unduly continued litigation. No attempt will be made here to choose between these considerations.

II

INDIRECT OUTLAYS

In connection with a taking by eminent domain, the individual, both as the representative for the general public and in his own right, can effectively question not only the quantum of a basic condemnation award, but also the propriety and suitability of a particular project. However, judicial condemnation procedures, as they exist today, are best suited—and, indeed, designed—to provide a forum in which a determination of the amount of compensation can be made. At best, they are imperfect for other problems. There exist other forums, initially administrative but with judicial review, in which the individual can challenge the propriety of the taking or otherwise attack it.

However, condemning authorities are faced with a major problem. The traditional condemnation procedures can increase the cost of a project appreciably through delay and increased legal costs. Remedial legislation, in some instances, is the only solution. But in others, those where the responsibility rests with the judiciary, what is needed is a reappraisal by the courts of their role. Our task in this article is not to review the entire field. Rather, it is to analyze a few special problems with which many recent decisions have been concerned.

A. Prior Negotiations

It is only natural that condemning authorities should normally attempt to acquire the property involved through direct negotiations. Obviation of lengthy and costly judicial condemnation proceedings is obviously beneficial to all concerned. Nevertheless, it sometimes occurs that a condemning authority can work most efficiently if it utilizes the judicial process without negotiating for amicable purchase. Some states, however, have enacted legislation requiring the condemning authority to negotiate a purchase before instituting condemnation proceedings. In these jurisdictions, a problem arises—whether negotiations for purchase are an inflexible prerequisite to condemnation.

In *Lookholder v. Zeigler*,[42] the Supreme Court of Michigan was confronted with legislation requiring negotiations not only with property owners, but also with lessees. The State Highway Commission, after determining the advisability of new construction, had negotiated with an owner offering him a price which included the

[42] 354 Mich. 28, 91 N.W.2d 834 (1958).

value of the leasehold. However, no negotiations were attempted with his lessees, the justification of this omission being the need for summary acquisitive action and the belief that the lessees could then negotiate with the owner for an amicable settlement. On appeal, the Michigan Supreme Court held that the condemnation proceedings were invalid.

Most leases contain a provision that, in the event of condemnation, no liability in favor of the lessee shall exist against the lessor. Further, what benefits one will not always benefit the other. Indeed, upon the assumption that each has a distinct property interest, the lessor would be in the fortuitous position of being able to sacrifice the lessee for his own (lessor's) advantage. Therefore, for the lessee to be dependent on the lessor in regard to negotiating is most inadequate. The tenant should be allowed to negotiate with, and to proceed directly against, the condemning authority. For this reason, the interpretation by the Supreme Court of Michigan that the state's prior negotiations requirement includes negotiations with a lessee seems justified.

B. Right to Appeal Condemnation Awards

Several recent decisions concern themselves with the basic, and as yet unsettled, question of the effect that payment of a preliminary condemnation award should have on the right of either the condemning authority or the condemnee to appeal. This problem has, to some degree, been magnified by the utilization of quick-taking procedures, where the condemning authority has the right to take immediate possession of land upon deposit in court of estimated damages. Under this procedure, the condemnee has a fund deposited in court by the condemnor which may be readily available to him.

The Supreme Court of Missouri in a recent case[43] determined the proper scope of appeal by a condemnee who had accepted the initial condemnation award. The State Highway Commission had condemned an entire parcel of land in connection with road construction. The lower court awarded damages, which were paid into court and subsequently withdrawn by the condemnee. Thereafter, on appeal, the owner challenged the validity of the condemnation proceedings as a whole. The court held that since the land owner had accepted the award, he was estopped from questioning any matters except those relating to the amount of damages.

On the other hand, *Woodside v. City of Atlanta*[44] was concerned with what, if any, prerequisites existed to the condemning authority's right to prosecute an appeal from an allegedly excessive condemnation award by its assessors. The Georgia Supreme Court held that a tender of payment to the condemnees or a deposit in court was a mandatory prerequisite to the condemnor's right to appeal. The condemning authority could not refuse to pay the amount awarded by the assessors and at the same time insist upon its right to take the property.

One step removed from the *Woodside* decision are recent rulings by the Supreme

[43] State v. Howald, 315 S.W.2d 786 (Mo. 1958).
[44] 214 Ga. 75, 103 S.E.2d 108 (1958).

Courts of Arizona and Nevada, both of which concern the question of whether the condemning authority can appeal a jury determination of damages in a condemnation suit, even though it took possession and paid the amount of the judgment.

In *State v. Jay Six Cattle Company,*[45] the condemning authority had taken possession of land pursuant to a quick-taking statute under which it could apply for immediate possession after a hearing on necessity and probable damages. Upon a court deposit of double the probable damages, possession was awarded. Subsequently, a jury trial was conducted on the issue of damages and a judgment entered, which the state paid into court. Contending that the award was excessive, the condemnor filed its notice of appeal. Despite this appeal, the trial court permitted the condemnees to withdraw the deposit in full satisfaction of the judgment. On appeal, the Supreme Court of Arizona refused to sanction the condemnees' contention that the state, by tendering the judgment into court and taking possession of the land, waived its rights to appeal. The court reasoned that to hold that payment constituted a waiver would mean, in effect, that, whenever a condemning authority sought use of property before the conclusion of an appeal, the condemnee would gain a fixed right to a possibly unjust and excessive award.

In *State v. Second Judicial District Court,*[46] unlike *Jay Six Cattle Company,* the condemning authority, being bound by a similar statute, contended at trial that it should not be required to deposit the amount of compensation adjudged if it took an appeal. The condemning authority took the position that to do so would waive its right of appeal if the condemnee withdrew the deposit in satisfaction of the judgment. The Supreme Court of Nevada, citing *Jay Six Cattle Company,* ruled, however, that its quick-taking statute had a similar purport to the Arizona statute with regard to preservation of the condemning authority's right to appeal. Therefore, the condemnor would not be prejudiced by tender of the amount of the judgment awarded by the trial court. The court held that such a tender is a prerequisite to the condemning authority's right to appeal on the question of damages. Of course, as the opinion acknowledges, the victory on appeal may be less meaningful if the property owner has squandered the award in the interval.

Our concern is not with the situation where a condemning authority has initially determined property valuation for the purpose of amicable negotiations with the condemnee. Instead, it is with the situation where, negotiated purchase failing, the initial determination of proper compensation is accomplished by independent bodies distinct in function and control from condemnors.[47] At this point, both parties should be afforded the right to question the award further.

However, mere recognition that government, as well as the individual, has the right to appeal does not resolve the complicated question whether the condemning authority should lose this right by taking possession or by provisionally paying the

[45] 85 Ariz. 220, 335 P.2d 799 (1959).

[46] 337 P.2d 274 (Nev. 1959).

[47] *E.g.,* Boards of View appointed by a court of competent jurisdiction in Pennsylvania. See note 18 *supra.*

amount of the award, or whether the condemnee forsakes all by accepting the initial award. The condemnee may have lost possession of his property. Without at least receipt of provisional compensation, his burden is extreme. Similarly, to the condemning authority, immediate possession ofttimes is crucial. Delay may not only drastically increase costs, but may prove an insurmountable obstacle to the success of many governmental projects.

Quick-taking statutes normally require a deposit with the court. Similarly, in their absence, the condemnor may be required to pay the amount of the initial award to the condemnee in order to take immediate possession. It is difficult to justify withdrawing the condemnor's right to appeal the compensation award because of its practical necessity for immediate possession. The condemnee suffers no harm, for he has access to the funds so deposited under quick-taking statutes, or to the judgment in traditional condemnation proceedings. Even if, under the applicable procedure, the condemnee cannot obtain payment of the initial award prior to disposition of an appeal, no basis exists to place the condemnor in the dilemma of either paying an excessive award or foregoing its right to immediate possession. Of course, in the latter instance, the condemnee is deprived of both his property and immediate compensation, but the fault lies not with the condemning authority.

The *Woodside* case,[48] which ruled that a tender of payment to the condemnees or a deposit in court was a mandatory prerequisite to the condemnor's right of appeal, creates special problems. There the initial award was made by three assessors, rather than by a jury.

To require deposit of an award by the condemnor at this early a stage in the proceedings—with the concomitant possibility that the money may be drawn down and squandered—may give too much weight to a relatively uninformed, and sometimes ill-considered, determination made without a judge's direct supervision. Perhaps, too, the funds of the condemnor might thereby be unduly tied up. Contrariwise, a ruling that a condemnor need never deposit money in court until final determination of appropriate compensation, while extremely favorable to public progress, unduly imposes upon the individual. A proper line of demarcation, therefore, seems to be at the point where the initial jury determination of compensation is made, for it is at this point that we first have a determining body which most representatively reflects individual interests and is operating fully within a framework of procedural safeguards.

In *State v. Howald*,[49] the Supreme Court of Missouri determined that receipt of compensation by the condemnee forecloses his right to contest other than the quantum of the award. No matter if the issue is the broad constitutionality of the taking, its propriety, or the amount of compensation. The condemnee is in the same position, for he has been deprived of possession of his property. Of course, it might have been possible for the condemnee to contest other than the amount of condemna-

[48] See note 44 *supra*.
[49] See note 43 *supra*.

tion during prior proceedings.[50] However, the failure of the condemnee to raise such a question at that point should not now foreclose him, for as noted hereafter in this article, individuals have but a tenuous right to question at the administrative level either the constitutionality of a particular project or its propriety. Receipt of compensation should not be determinative of the issues that the condemnee can raise in protest, certainly if he demonstrates his willingness and ability to repay the money in the event of a favorable decision.

C. Finality of Agency Determinations

Most legislatures have not specified either the scope or the manner in which a court may review agency determinations. In some jurisdictions, administrative procedure acts govern the manner in which the agency makes its determinations and the manner of individual protests. Of course, where there is specific legislation or an applicable procedure act, many problems are resolved. However, typical of the situation in a majority of states is that which arose in Connecticut. In *Bahr Corporation v. O'Brion*,[51] a redevelopment agency had decided after public hearings to condemn land including that which was owned by the plaintiff, who sought to enjoin action by the agency to take his land. The land owner protested the agency's decision as being unreasonable, an abuse of power, and a taking of property for a private use rather than a public one. The Connecticut Redevelopment Act did not specifically provide the scope of review for agency actions. Further, neither the state administrative procedure act nor its rules of court specified the applicable procedure and scope of review. On appeal, it was held that the plaintiff was entitled to a judicial review whether the agency determination was unreasonable, in bad faith, or an abuse of its power. He was not required to allege or prove any fraud by members of the agency.

On the surface, it might appear that no justification can be advanced for this ruling.[52] Its obvious result is a wasteful delay of agency action. Yet, too often existing administrative procedures do not adequately heed individual interests; and property owners are not afforded a fair opportunity to challenge the propriety of a proposed project. The right to appear at a public hearing conducted by the agency is often futile, for the property owner does not have adequate time to prepare his case. What is really needed is an adequate administrative procedure. For instance, the local agency should be required to make specific findings to be incorporated in the record; all information presented at the public hearings and all other factors which the agency has considered in making its decision that an area is blighted and requires renewal should be presented to the public. Furthermore, adequate time should be afforded property owners so that they may prepare their cases. Thus, the *Bahr* de-

[50] See note and text at note 51 *infra*.

[51] 146 Conn. 237, 149 A.2d 691 (1959).

[52] See Note, *Judicial Review of Urban Redevelopment Agency Determinations*, 69 YALE L. J. 321 (1959).

cision must be read against a background of legislative failure in Connecticut to provide sufficient administrative safeguards.

CONCLUSION

No attempt has here been made to set forth all the problems that exist in the field of eminent domain. Such a task is, indeed, impossible of accomplishment in other than a complete text—adequate today but, nevertheless, obsolete tomorrow. However, the problems touched upon typify some of the areas in which corrective action by courts and legislatures is necessary. Continued delay in taking such corrective action will threaten many individual governmental projects with failure. Conversely, intelligent and timely remedial action will further the cause of dynamic—and good—government.

THE ECONOMICS OF URBAN RENEWAL*

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INTRODUCTION

In light of two implications of urban renewal, it is not at all surprising that this phenomenon provides an excellent area for the application of welfare economics. These implications are: First, that the market mechanism has not functioned "properly" in urban property; and second, that positive action can "improve" the situation. The propositions of welfare economics provide some tools for judging public policy measures such as urban renewal. But since these propositions themselves are based upon ethical postulates, it seems desirable that we begin our discussion of urban renewal by stating explicitly what we consider the role of the economist to be in this situation.

I

WELFARE ECONOMICS AND URBAN RENEWAL

Welfare economics itself provides one criterion, the Pareto condition, for judging public policy measures. The Pareto condition states that a social policy measure can be judged "desirable" if it results in either (1) everyone being made better off, or (2) someone being made better off without anyone being made worse off. This rule is, of course, an ethical proposition, but it requires a minimum of premises and should command wide assent.

On the other hand, the economist need not be limited solely to the Pareto condition in giving policy advice. This becomes especially true when the objective ambiguity of the terms "better off" and "worse off" is considered. Indeed, the role of the economist in the formation of social policy may be compared to that of the consultant to an industrial firm. The consultant to a firm serves two functions. First, given the goals of the firm, he tries to find the best or most efficient means of achieving these goals. The second function of the consultant is equally important; he must try to clarify vague goals by pointing out possible inconsistencies and determining implications in order that re-evaluations and explicit statements can be made.

We conceive of the role of the economist as quite similar to that outlined for the consultant. First, the economist may try to clarify social goals by pointing out

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inconsistencies and determining implications of possible social rules. Second, if a goal happens to be given and agreed upon—*i.e.*, if a social welfare function is defined—then the economist might try to advise the body politic by proposing policies for the attainment of the defined goals.

It is in the above spirit that we consider the problem of urban renewal. Granted the individualistic basis of western civilization, it seems reasonable to assume that any action which satisfies the Pareto condition would improve social welfare and, therefore, should be desired by society. On the other hand, society might desire, granted the institutional form of political decision-making, certain actions which violate the narrowly conceived Pareto condition.[1] Certainly income redistribution would fit this category. And so may urban renewal.

Specifically, the social welfare function which we use has the following properties: If the sum of the benefits, measured by changes in capital values, exceeds the sum of the costs, then the action is termed desirable. While this welfare criterion may not seem clear at this point, it is appropriate to note here that a major portion of the remainder of the paper will be devoted to determining how benefits and costs are to be measured. What is important here is to make clear the basis upon which our judgments will be made.

Several characteristics of this welfare criterion should be noted here. First, any action which satisfies the narrowly conceived Pareto condition will satisfy this criterion. On the other hand, any action which satisfies the welfare criterion need not meet the Pareto condition unless compensation is required. Second, our criterion is concerned with the efficient allocation of resources. The question of the ethically desirable distribution of income will not be considered here, although some might hold that urban renewal is concerned with income redistribution. We merely point out that income redistribution can be more efficiently achieved through other means than urban renewal.

II

THE PRICE MECHANISM AND URBAN BLIGHT

Having stated the position from which we shall make policy judgments, we now must examine the question of why urban renewal is necessary. In other words, why do "blighted" areas develop and persist? Why do individuals fail to keep their properties in "acceptable" states of repair?

Several arguments may be advanced as answers to the above questions. For example, it has been asserted that property owners have exaggerated notions of the extent and timing of municipal expansion. Hence they may neglect possible improvements of existing structures in anticipation of the arrival of more intensive uses which might bring capital gains.[2] Note that even if this argument is accepted

[1] It is worthy of note that it can be argued very convincingly, if the individualistic ethic is adopted, that any social welfare function must satisfy a broadly conceived Pareto condition—that is, a Pareto condition defined by political consensus. See, *e.g.*, Buchanan, *Positive Economics, Welfare Economics, and Political Economy*, 2 J. LAW & ECONOMICS 124 (1959).

[2] Fisher, *Economic Aspects of Zoning, Blighted Areas, and Rehabilitation Laws*, 3 AM. ECON. REV. 334 (1942).

as plausible—and the reason why property owners might have exaggerated notions about municipal expansion is by no means evident—it does not constitute an argument for urban renewal. Instead, one might infer that, given sufficient time, a transition to intensive and profitable uses would take place.[3] Then too, it can be argued that there is no reason to expect governmental authorities to have better judgment than individual entrepreneurs.

Aside from the previous "mistaken judgments" argument, it might seem plausible at first glance to believe on the basis of price theory and the profit maximization assumption that urban blight could not occur. After all, would not profit-maximizing individuals find it to their advantage to keep their property in a state of repair? Certainly it seems reasonable to suppose that if individual benefits from repair or redevelopment exceed individual costs, then individual action could be expected and no social action would be necessary. We shall now attempt to demonstrate why rational individual action might allow property to deteriorate and blight to occur.

First of all, the fact that the value of any one property depends in part upon the neighborhood in which it is located seems so obvious as hardly to merit discussion. Yet, since this simple fact is the villain of the piece, further elaboration is warranted. Pure introspective evidence seems sufficient to indicate that persons consider the neighborhood when deciding to buy or rent some piece of urban property.[4] If this is the case, then it means that externalities are present in utility functions; that is to say, the subjective utility or enjoyment derived from a property depends not only upon the design, state of repairs, and so on of that property, but also upon the characteristics of nearby properties. This fact will, of course, be reflected in both capital and rental values. This is the same as saying that it is also reflected in the return on investment.

In order to explain how interdependence can cause urban blight, it seems appropriate to introduce a simple example from the theory of games. This example, which has been developed in an entirely different context and is commonly known as "The Prisoner's Dilemma," appears to contain the important points at issue here.[5]

[3] Indeed, it can even be argued that this line of reasoning considered alone leads to the conclusion that urban renewal expenditures are wasteful. See, *e.g.*, Davis, *A Pure Theory of Urban Renewal*, 36 LAND ECONOMICS 221 (1960).

[4] This interdependence of urban property values has, of course, long been recognized. See, for example, the discussion in ALFRED MARSHALL, PRINCIPLES OF ECONOMICS bk. 5, ch. 11 (8th ed. 1920). The following quote is especially interesting in this regard. "But the general rule holds that the amount and character of the building put upon each plot of land is, in the main (subject to the local building bylaws), that from which the most profitable results are anticipated, with little or no reference to its reaction on the situation value of the neighorhood. In other words, the site value of the plot is governed by causes which are mostly beyond the control of him who determines what buildings shall be put on it." *Id.* at 445.

[5] For an explanation of the "game theoretic" points of interest in the Prisoner's Dilemma example, see R. DUNCAN LUCE & HOWARD RAIFFA, GAMES AND DECISIONS 94-102 (1957). The reason for the intriguing title of this type of game theory analysis is interesting in itself. The name is derived from a popular interpretation. The district attorney takes two suspects into custody and keeps them separated. He is sure they are guilty of a specific crime but does not have adequate evidence for a conviction. He talks to each separately and tells them that they can confess or not confess. If neither confesses, then

For the sake of simplicity, let us consider only two adjacent properties. More general situations do not alter the result but do complicate the reasoning. Let us use the labels Owner I and Owner II. Suppose that each owner has made an initial investment in his property from which he is reaping a return, and is now trying to determine whether to make the additional investment for redevelopment. The additional investment will, of course, alter the return which he receives, and so will the decision of the other owner.

The situation which they might face can be summarized in the following game matrix:

		Owner II	
		Invest	Not Invest
Owner I	Invest	(.07, .07)	(.03, .10)
	Not Invest	(.10, .03)	(.04, .04)

The matrix game is given the following interpretation: Each property owner has made an initial investment and has an additional sum which is invested in, say, corporate bonds. At present, the average return on both these investments, the property and the corporate bonds considered together, is four per cent. Thus if neither owner makes the decision to sell his corporate bonds and make a new investment in the redevelopment of his property, each will continue to get the four per cent average return. This situation is represented by the entries within brackets in the lower right of the matrix where each individual has made the decision "Not Invest." The left hand figure in the brackets always refers to the average return which Owner I receives, and the right hand figure reflects the return of Owner II. Thus for the "Not Invest, Not Invest" decisions, the matrix entry reflects the fact that both owners continue to get a four per cent return.

On the other hand, if both individuals made the decision to sell their bonds and invest the proceeds in redevelopment of their property, it is assumed that each would obtain an average return of seven per cent on his total investment. Therefore, the entry in the upper left of the matrix, the entry for the "Invest, Invest" decisions, has a seven per cent return for each owner.

The other two entries in the matrix, which represent the situation when one owner invests and the other does not, are a little more complicated. We assumed, as was mentioned earlier, that externalities, both external economies and diseconomies, are present. These interdependencies are reflected in the returns from investment. For example, consider the entries in the brackets in the lower left corner of the matrix. In this situation, Owner I would have decided to "Not Invest" and Owner II would have decided to "Invest."

he will book them on some minor charge and both will receive minor punishment. If both confess, then they will be prosecuted but he will recommend less than the most severe sentence. If either one confesses and the other does not, then the confessor will receive lenient treatment for turning state's evidence, whereas the latter will get "the book" slapped at him. The Prisoner's Dilemma is that without collusion between them, the individually rational action for each is to confess.

Owner I is assumed to obtain some of the benefits from Owner II's investment, the redevelopment contributing something to a "better neighborhood." For example, if the two properties under consideration happened to be apartment buildings, the decision of Owner II to invest might mean that he would demolish his "out-dated" apartment building and construct a new one complete with off-street parking and other amenities. But this would mean that the tenants of Owner I would now have an easier time finding parking spaces on the streets, their children might have the opportunity of associating with the children of the "higher class" people who might be attracted to the modern apartment building, and so forth. All this means that (as soon as leases allow) Owner I can edge up his rents. Thus his return is increased without having to make an additional investment. We assume that his return becomes ten per cent in this case, and this figure is appropriately entered in the matrix. Owner II, on the other hand, would find that, since his renters also consider the "neighborhood" (which includes the ill effects of Owner I's "out-dated" structure), his level of rents would have to be less than would be the case if his apartment building were in an alternative location. Thus we assume that the return on his total investment (the investment in the now-demolished structure plus the investment in the new structure) falls to three per cent. This figure is also appropriately entered in the matrix. For simplicity, the reverse situation, where Owner I decided to invest and Owner II decides not to invest, is taken to be similar. Thus the reverse entries are made in the upper right corner of the matrix.[6]

Having described the possible situations which the two owners face, consider now the decision-making process. Both owners are assumed to be aware of the returns which are available to themselves in the hypothesized situations. Owner I will be considered first. Owner I must decide whether to invest or not invest. Remember that the left hand entries in the brackets represent the possible returns for Owner I. Two possible actions of Owner II are relevant for Owner I in his effort to make his own decision. Therefore, Owner I might use the following decision process: Assume, first, that Owner II decides to invest. Then what decision would be the most advantageous? A decision to invest means only a seven per cent return on Owner I's capital, whereas the decision not to invest would yield an average return of ten per cent of the total relevant amount of capital. Therefore, if Owner II were to decide to invest, it would certainly be individually advantageous to Owner I not to invest. But suppose that Owner II decided not to invest. Then what would be the most advantageous decision for Owner I? Once again the results can be seen from the matrix. For Owner I the decision to invest now means that he will

[6] Economists might think that we have used inappropriate and sleight-of-hand methods by lumping together old and new investments, and also by considering the average rate of return instead of marginal rates. Actually these methods are completely appropriate here due to the way we have simplified the problem to make the exposition of the game theory easier. The old investment does not represent a sunk cost, since it is yielding a return and thus has economic value. Both owners are assumed to have precisely the amount of money in bonds that is required for the redevelopment of their property. The rate of return on the bonds can be assumed to be the "social rate of return" and the best alternative available to the two individuals. Since the owners are interested in maximizing the total income from their capital, the above assumptions allow us to lump together and to use average rates.

receive only a three per cent return on his capital, whereas the decision not to invest means that he can continue to receive the four per cent average return. Therefore, if Owner II were to decide not to invest, it would still be individually advantageous to Owner I not to invest.

The situation for Owner II is similar. If Owner I is assumed to invest, then Owner II can gain a ten per cent average return on his capital by not investing and only a seven per cent return by investing. If Owner I is assumed not to invest, then Owner II can gain only a three per cent return by investing, but a four per cent average return by not investing. Therefore, the individually rational action for Owner II is also not to invest.

The situation described above means, of course, that neither Owner I nor Owner II will decide to invest in redevelopment. Therefore, we might conclude that the interdependencies summarized in the Prisoner's Dilemma example can explain why blighted areas can develop[7] and persist. Before concluding the analysis, however, we might try to answer some questions which may at this point be forthcoming.

First of all, it might be suggested that we have imposed an unrealistic condition by not allowing the two owners to coordinate their decisions.[8] After all, does it not seem likely that the two owners would get together and mutually agree to invest in the redevelopment of their properties? Not only would such action be socially desirable, but it would seem to be individually advantageous. Note that while it might be easy for the two property owners in our simple example to communicate and coordinate their decisions,[9] this would not appear to be the case as the number of individuals increased. If any single owner were to decide not to invest while all other owners decided to redevelop, then the former would stand to gain by such action. The mere presence of many owners would seem to make coordination more difficult and thus make our assumption more realistic. Yet, this is precisely the point; it is the objective of social policy to encourage individuals in such situations to co-ordinate their decisions so that interdependencies will not prevent the achievement of a Pareto welfare point. In this regard, it is worthwhile to note that, if coordination and redevelopment do take place voluntarily, then no problem exists, and urban renewal is not needed.

Second, it might be observed that, if coordinated action does not take place, incentive exists for either Owner I, Owner II, or some third party to purchase the properties and develop both of them in order that the seven per cent return can be

[7] It is to be emphasized that these results depend upon the interdependencies or neighborhood effects being "sufficiently strong" to get a combination of returns similar to those which we used in the example. It is unlikely that this condition would be satisfied for all urban property. Our point is that similar combinations seem possible, and if they do occur, then they can explain one peculiar phenomenon of urban property. The explanation is presented later in the paper.

[8] It is worthy of note that experimental data concerning the prisoner's dilemma in other contexts tend to indicate that, if communication does not take place, players continually choose individually rational strategies. For the results of these laboratory experiments, see Scodel, Minas, Ratoosh & Lipetz, *Some Descriptive Aspects of Two-Person Non-Zero-Sum Games*, 3 J. CONFLICT RESOLUTION 114 (1959).

[9] It will be recalled that we made the example overly simple only for the purpose of exposition. While the consideration of many individuals would make the example more realistic, it would only make the game theory more complicated and not alter the result as far as this case is concerned.

obtained. And certainly, it cannot be denied that this often occurs in reality. However, it is necessary to point out here that, because of the institutional pecularities of urban property, there is no assurance that such a result will always take place. Consider, for example, an area composed of many holdings. Suppose that renewal or redevelopment would be feasible if coordination could be achieved, but that individual action alone will not result in such investment due to the interdependencies. In other words, the situation is assumed to be similar to the previous example except that many owners are present. Incentive exists for some entrepreneur to attempt to purchase the entire area and invest in redevelopment or renewal.

Now suppose that one or more of the owners of the small plots in the area became aware of the entrepreneur's intentions. If the small plots were so located as to be important for a successful project, then the small holders might realize that it would be possible to gain by either (1) using their position to expropriate part of the entrepreneur's expected profits by demanding a very high price for their properties, or (2) refusing to sell in order to enjoy the external economies generated by the redevelopment. If several of the small holders become aware of the entrepreneur's intentions, then it is entirely possible, with no communication or collusion between these small holders, for a situation to result where each tries to expropriate as much of the entrepreneur's profit as possible by either of the above methods. This competition can result in a Prisoner's Dilemma type of situation for the small holders. Individually rational action on their part may result in the cancellation of the project by the entrepreneur. Indeed, anyone familiar with the functioning of the urban property market must be aware of such difficulties and of the care that must be taken to prevent price-gouging when an effort is made to assemble some tract of land.[10]

If the above analysis is correct, then it is clear that situations may exist where individually rational action may not allow for socially desirable investment in the redevelopment of urban properties. Now such situations need not—indeed, in general will not—exist in all urban properties. The results of the analysis not only required special assumptions about the nature of investment returns caused by interdependencies, but it was also shown that, due to the special institutional character of tract assembly, the presence of numerous small holdings can block entrepreneurial action for redevelopment. These two conditions may or may not be filled for any given tract of land. However, we now may use the above results to *define* urban blight.[11] Blight is said to exist whenever (1) strictly individual action does not result in redevelopment, (2) the coordination of decision-making via some means would result in redevelopment, and (3) the sum of benefits from renewal

[10] For example, Raymond Vernon states, "As the city developed, most of its land was cut up in small parcels and covered with durable structures of one kind or another. The problem of assembling these sites, in the absence of some type of condemnation power, required a planning horizon of many years and a willingness to risk the possibility of price gouging by the last holdout." RAYMOND VERNON, THE CHANGING ECONOMIC FUNCTION OF THE CENTRAL CITY 53 (1959).

[11] It is to be pointed out and emphasized that our definition of the term "blight" does not seem to be what is meant by the term in common usage where it has a connotation of absolute obsolescence. Our definition refers to the misuse of land in general and carries no such connotation. The difference in meanings is unfortunate, but we could not find a more appropriate term.

could exceed the sum of costs. These conditions must be filled. We shall devote a major portion of the latter part of the paper to making this definition operational; but, for the moment, let it suffice for us to point out two factors. First, it is a problem of social policy to develop methods whereby blighted areas can be recognized and positive action can be taken to facilitate either redevelopment or renewal. Second, and this point may be controversial, blight is not necessarily associated with the outward appearance of properties in any area.

Since this second point may be subtle and seem contrary to intuitive ideas about blight, further discussion may be warranted. Note that we have defined blight strictly in relation to the allocation of resources. The fact that the properties in an area have a "poor" appearance may or may not be an indication of blight and the malallocation of resources. For several factors, aside from tastes, help to determine the appearance of properties. The situation which we have described, where individually rational action may lead to no investment and deterioration, is only one type of case. Another may be based on the distribution of incomes. Poor classes can hardly be expected to afford the spacious and comfortable quarters of the well-to-do. Indeed, given the existence of low income households, a slum area *may* represent an efficient use of resources. If the existence of slums per se violates one's ethical standards, then, as economists, we can only point out that for elimination of slums the main economic concern must be with the distribution of income, and urban renewal is not sufficient to solve that problem. Indeed, unless some action is taken to alter the distribution of income; the renewal of slum areas is likely to lead to the creation of slum areas elsewhere.[12] It is to be emphasized that slums may or may not satisfy the definition of a blighted area. On the other hand, the mere fact that the properties in some given area appear "nice" to the eye is not sufficient evidence to indicate that blight (by our definition) is absent.

One additional remark of clarification seems warranted. It is obvious that not all individuals are free to purchase or rent property in all areas of the metropolis. Discrimination—*e.g.*, by race—may create two or more "separate" markets, and there seems to be no reason to suspect short-run equilibrium in the sense of investment return *between* markets. We simply note here that, granted the discrimination, this fact does not affect our definition of blight, nor does it alter the proposals which we shall present.

[12] It is a curious fact that renewal seems to be regarded as a "cure" for slum areas. For, granted the distribution of income and the fact that the poor classes simply cannot afford to pay high enough rents to warrant the more spacious and confortable quarters, the renewal of all slum areas, unless accompanied by an income-subsidy program, would only be self-defeating and lead to social waste. Renewal of all slum areas could cause rents for the "nicer" quarters to fall temporarily within the possible range of the poor classes, but the rents would not be sufficiently high to warrant expenditures by the landlord to maintain the structure. New slums would appear, calling for more renewal activity. This process would simply continue. On the other hand, efficient slum-removal programs are possible, and one will be presented at a later point in this paper.

III

A BRIEF CRITIQUE OF PRESENT PRACTICES

Having seen that, due to externalities or interdependencies and the difficulty of tract assembly, individually rational action may allow blight to develop, we now turn our attention to questions of public policy. It bears repeating that wherever our definition of blight is satisfied, then resources are misallocated in the sense that some institutional arrangement—some means—exists under which redevelopment or renewal could profitably be carried out. The problem is to discover that institutional arrangement. We begin our search by examining briefly the relevant aspects of the present practices.

Title I of the Housing Act of 1949[13] seems to have set the general pattern for urban renewal practices. While the Act of 1954[14] broadened the concept, the general formula for urban redevelopment remains essentially unchanged. Both federal loans and capital grants are provided for the projects. Loans are generally for the purpose of providing working capital. The capital grants may cover up to two-thirds of the net cost of the project, with the remainder of the funds being provided by either state or local sources.[15]

The striking fact about the present program, and also about many of the proposals for extending that program, is the utter lack of a relevant criterion for expenditures. How much should be invested in urban renewal? How does one determine whether projects are really worthwhile? Does the present program attempt to "correct" the allocation of resources or does it simply result in further misallocation? There seems to have been little or no serious effort to find answers to these questions. In fact, it is widely admitted that there is a lack of adequate criteria even to determine what projects should be undertaken.[16]

It seems evident from the statements of mayors and others who propose expansions of the present program that the need approach to governmental expenditures underlies their suggestions. That is to say, a certain project "needs" to be carried out; and, granted this requirement, money is sought for the project. It should be evident that this approach to governmental expenditures may not result in the correct allocation of resources. The need approach obscures budgetary considerations and makes comparison of alternatives difficult, since a need is simply assumed without reference to other possible areas of expenditure. The need approach is arbitrary and overlooks

[13] 63 Stat. 413, 42 U.S.C. §§ 1441-60 (1958).

[14] 68 Stat. 622, as amended, 42 U.S.C. §§ 1450-62 (1958); 68 Stat. 596, as amended, 12 U.S.C. §§ 1715*k*, 1715*l* (1958).

[15] There are, of course, conditions which must be satisfied before a community can be eligible for federal funds. See, *e.g.*, COMM'N ON INTERGOVERNMENTAL RELATIONS, TWENTY-FIVE FEDERAL GRANT-IN-AID PROGRAMS (1955).

[16] A remark by Morton J. Schussheim, Deputy Director of the Area Development Division of the Committee for Economic Development, is interesting in this respect. Mr. Schussheim writes, "It is true . . . that local officials responsible for urban renewal programs do not have adequate criteria for determining what projects to undertake and on what scale." *A Pure Theory of Urban Renewal: A Comment*, 34 LAND ECONOMICS 395 (1960).

the return on investment, an extremely important consideration for the problem of a rational allocation of resources.[17]

IV

REDISTRIBUTION, THE COST-BENEFIT CRITERION, AND URBAN RENEWAL

Having pointed out that the existing institutional arrangements concerning urban renewal contain no explicit criterion for determining either the amount of such expenditure or when a project is desirable, we now propose the previously introduced benefits-cost criterion and will discuss later the institutional arrangements under which it could be applied. First, however, let us detail more fully our use of this criterion and the reasons for its selection.

We assume that income and utility are positively correlated. This means that if potential benefits, appropriately-defined, exceed costs, then the conditions for Pareto optimality, in the absence of corrective measures, are not filled. It is possible for some action to be taken which will make one or more persons better off without making anyone worse off.[18] In this context, the action will take the form of investment in urban renewal.

It is to be emphasized again that the benefits-cost criterion refers only to the problem of efficiency—*i.e.*, to the allocation of resources on the basis of a given distribution of income. However, it is possible to design programs which do redistribute income but which still are completely compatible with the benefit-cost criterion. The point is that the two problems—distribution and allocation—must be kept conceptually separate.

Given the fact that interdependencies are a cause of blight, two kinds of actions are possible—preventive and reconstructive. We consider first preventive action.

As was pointed out earlier, the problem in preventing the development of blight consists essentially in finding methods of coordinating the decisions about investment in repair and upkeep so that the socially and individually desirable choices are equated. One step in this direction can be made through the development and use of a special type of building code which bears a superficial resemblance to municipal zoning.[19] It can be seen from the Prisoner's Dilemma example discussed earlier that it is individually desirable to invest *if there is assurance that all individuals*

[17] It may be commonplace to point out that there exists for any given social action a social welfare function which is maximal for that action, and by definition this resource allocation is optimal. Our point is simply that it seems dubious that a type of need approach to forming criteria is reasonable, given that urban problems are not unique as a social problem.

[18] It is easy to see the exact relation between benefits-costs and the Pareto condition. If the sum of benefits exceeds the sum of costs for some particular action, then although some individual might be made worse off by the action, it is theoretically possible to pay compensation to that individual so that the Pareto condition will be satisfied.

[19] It is to be emphasized that the building code envisioned here bears only a superficial resemblance to zoning. The two tools are aimed at different problems. Municipal zoning tries to prevent the establishment of "undesirable" properties in specified neighborhoods. These special building codes would be aimed at the elimination of interdependencies affecting repair and upkeep decisions. For an elaboration on the complexities involved in municipal zoning, see Davis & Whinston, *The Economics of Complex Systems: The Case of Municipal Zoning* (O.N.R. Research Memorandum, Graduate School of Industrial Administration, Carnegie Institute of Technology, 1961).

will be constrained to make a similar decision. The special building code specifying minimum levels of repair and upkeep can provide a rough approximation toward optimal levels of coordination.

A brief outline of the scheme follows: Since it is intuitively obvious that different types of property require different kinds of repair and types of upkeep, it would seem desirable that these building codes differ according to the type property under consideration. The role of the planner would be to try to determine the proper restrictions for each type of property. He could try to gather information on interaction effects through the use of statistical sampling techniques and questionnaires. He then could draw up districts and try to estimate the proper level of the building code for each district. A crude approximation to the benefit-cost criterion is easily supplied. It is advantageous to property owners mutually to constain themselves to make "appropriate" repair expenditures, for this coordinates decisions. Therefore, the planner can simply submit the proposed code for each district to the property owners of that district; if the planner has proposed an appropriate code, then mutual consent should be forthcoming. If mutual consent is not obtained, then it would seem suitable to assume that the proper code for the district has not been proposed and that a new proposal would be necessary.[20]

While codes adopted via the above scheme should be helpful in preventing blight, it must be noted that implementation of this plan would require the selection of an appropriate institutional and legal framework. As economists, we do not pretend to know the legal difficulties which might be involved; but a joint effort by the two professions to set up the framework for such a scheme seems to us to be desirable.

Let us now turn our attention to the policy problem when blight is already in existence. Present practices provide something of a framework here; what is missing is a relevant criterion. Of course, it should be noted that it may sometimes be possible to obtain redevelopment through individual effort via the previously-stated special-building-code method. In other instances, the optimal property uses may have changed from what they formerly were. The area may be composed of lots too small to obtain an orderly transition of property uses by means of the building code. It may be desirable to replan streets, or other reasons may be advanced for the usual type of urban renewal effort. Therefore, let us try to determine the appropriate comparison of costs and benefits when the usual type renewal activity takes place.

Let us assume that the city government has marked some blighted area for redevelopment. Taking the property tax rate as given, suppose that the city has raised funds for the project by selling bonds. With the money thus raised, the city has purchased the blighted area, using the right of eminent domain wherever needed.

[20] Our use of the term "mutual consent" may represent something of a subterfuge. In actuality, it may not be desirable to insist on unanimity nor would it seem desirable to use a simple majority. Something on the order of eighty to ninety per cent may be reasonable. For a discussion of the problems involved in voting and the difficulties associated with the selection of political decision rules, see the unpublished manuscript by JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT (mimeo.) (Department of Economics, University of Virginia, 1959).

Suppose that the city has demolished the outdated structures, made adequate provision for public services, and then, having finished its part of the operation, sold lots to entrepreneurs who have agreed in advance to build, say, modern apartment buildings.

Note what city action has accomplished. It has removed the obstacles to private renewal. The right of eminent domain has removed the possibility of price-gouging and stubborn property owners acting so as to prevent the assembly of a large enough tract. Each entrepreneur who buys the lots from the city is assured that adjoining lots will also be suitably developed, so that interaction difficulties are eliminated.

One fact needs great emphasis here. *The elimination of externalities or interaction effects causes social and private products to be equated.* Therefore, if possible redistribution is left aside; and if for the moment problems are waived which arise from public projects where the market mechanism does not serve as an adequate guide, then it can be stated that revenues and expenditures can be made identical to costs and benefits. Therefore, renewal projects are warranted if, and only if, revenues exceed expenditures. And, even where problems associated with redistribution and public projects are not waived, it is still possible to make the revenue-expenditure criterion approximate the benefit-cost criterion, although some administrative difficulties are involved.

What are the appropriate comparisons of costs and benefits? Consider first the case without the complications. The costs of the local government include the acquisition of land, demolition and improvements, aiding the relocation of displaced families, and interest expenses.[21] The measurement of revenues is slightly more complicated. The primary item, of course, would be receipts from the sale of lots. Since we are dealing with local government, however, a tax on real property will exist. Since the discounted value of the tax is likely to be shifted onto the immobile resource—land—it is necessary to account for this factor. If the project is successful, the new structures should have a higher value than the old; so there should be a net addition to tax revenues. This net addition should be discounted to a present value and counted as a receipt from the project. Thus, a comparison of revenues and expenses is possible, and the project is warranted only if revenues exceed expenses.

We now consider the second case with the additional complications. Note that the previous discussion still applies here, with the following qualifications upon the administrative rules involved. If public projects such as parks, playgrounds, public buildings, and so forth, are planned in conjunction with the renewal effort, then estimates of the social benefit to be derived from these projects must be made by the

[21] Peculiarly enough, the present-day requirement that individuals be paid for their property and the administrative rule of aiding individuals who may be dislocated to find new quarters affords a method of approximate compensation so that the Pareto condition can be satisfied.

governmental unit or units which ordinarily pay for them.[22] These estimated benefits are to be considered as revenues from the renewal effort, and the appropriate governmental units are to be required to contribute these amounts to the authority which administers the renewal activity. Thus the revenue-expenditure criterion should very closely approximate the benefits-cost criterion, depending, of course, upon how well the governmental units estimate the social benefits derived from the special public projects.

If there happens to exist some agreed-upon ethical distribution of income, then we point out first that urban renewal is not an efficient method of achieving redistribution. Possible benefits might accrue to special groups instead of the low-income classes. Other methods for simple redistribution exist which should be preferred to urban renewal. However, if the ethical distribution is connected with some arbitrary housing standard below which conditions are viewed as inadequate for "decent living," the cost-benefit criterion need not be rendered useless. Conditional subsidies could be granted to the low income households living in substandard housing. Thse subsidies would make it possible for the cost-benefit criterion to work effectively for renewal purposes.

Several corollaries to the cost-benefit criterion should be pointed out. If problems of ethical income distribution are waived, then from the standpoint of a rational allocation of resources, no federal or state subsidies are needed for urban renewal purposes per se. Of course, the adjustments made for the second case may have to be accomplished, but note that in reality these are based upon considerations not directly dependent upon urban renewal. Renewal projects should not lose money. Indeed, they should result in a profit. On the other hand, granted the fact that constitutional and/or statutory debt limits have often been imposed upon local governments, these should be waived for borrowing for urban renewal purposes. Finally, the local governments should be granted the power of eminent domain for urban renewal purposes.

CONCLUSION

In arriving at these indications for the use of the cost-benefit criterion in urban renewal, we started with the Pareto condition. However, it was suggested that other social welfare functions, which allow for income redistribution or even minimum condition housing, need not affect the usefulness of this criterion as long as the rational allocation of resources is viewed as a *conceptually separate* problem. It is to be emphasized that for the purpose of urban renewal, conceptual separation of the two problems can be achieved through the methods outlined above.

[22] We assume that the units which ordinarily pay for this type of public projects are identical to the units which derive the benefits from these projects. If this is not the case, then further administrative adjustments have to be made, but these adjustments should be made anyway and should not be dependent upon possible urban renewal projects.

URBAN REDEVELOPMENT—THE VIEWPOINT OF COUNSEL FOR A PRIVATE REDEVELOPER

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INTRODUCTION

Prior to the solicitation by the local public agency (LPA)[1] of bids for the land it has acquired, the attorney in private practice is unlikely to have very much professional contact with urban redevelopment. He may be called into negotiations with the LPA when it desires to acquire land owned by a client, and if negotiation fails, he may litigate a property condemnation suit.[2] He may also be asked for advice when deteriorating property owned by a client, long ignored by the city housing divisions, is given a thorough check in connection with an area rehabilitation program and a long list of violations is served upon the owner.[3] Condemnations and code violations are familiar legal work whose principal facet in urban redevelopment is the administrative finding of "slum and blight" by the LPA.[4]

Beginning with land disposition, however, the unfamiliar problems will appear.

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[1] National Housing Act of 1949, § 110(h), 63 Stat. 421, 42 U.S.C. § 1460(h) (1958), defines local public agency as ". . . any state, county, municipality or other governmental entity or public body, or two or more such entities or bodies, authorized to undertake the project for which assistance is sought. . . ."

[2] A policy of compensating relocatees and condemnees for loss of good will, moving expenses, etc., is evolving not only as a matter of legislative policy, but also as a matter of judicial decision. See Comment, *Eminent Domain Valuation in an Age of Redevelopment: Incidental Losses*, 67 YALE L.J. 61 (1957); Note, *Urban Renewal: Problems of Eliminating and Preventing Urban Deterioration*, 72 HARV. L. REV. 504, 525-26 (1959).

[3] See Guandolo, *Housing Codes in Urban Renewal*, 25 GEO. WASH. L. REV. 1 (1956), HOUSING AND HOME FINANCE AGENCY, CODES AND ORDINANCES ADVISORY BULLETIN AB-1-58.

[4] Because urban redevelopment legislation is comparatively recent, condemnation for redevelopment is still running a gauntlet of constitutionality cases, although the federal constitutionality issue seems to have been resolved, see Berman v. Parker, 348 U.S. 26 (1954); and almost all state constitutionality cases (many of which have been brought as taxpayers' suits, presumably by prospective condemnees anxious to avoid the accelerated blight caused by move-outs of established residents and reduction of maintenance when an area is marked for demolition) have found in favor of the legislation. See Annot., 44 A.L.R.2d 1414 (1955). One issue more easily raised in urban redevelopment condemnation cases than in many cases where a specific site is essential to a specific public project (such as contiguous land to expand City Hall or land in a particular area for a grammar school) is the propriety of taking property that is itself in good condition. But see Berman v. Parker, *supra*, at 35, holding that the effect on the entire area and not the condition of the particular building is the appropriate test: "Property may of course be taken for this redevelopment which, standing by itself, is innocuous and unoffending. . . ." Similarly, it may be urged that the application of the plan to the particular property is an unreasonable balancing of public versus private interests. Thus, Sullivan, *Administrative Procedure and the Advocatory Process in Urban Redevelopment*, 45 CALIF. L. REV. 134, 151 (1957), suggests that counsel for private land owners might be more skillful in resisting planners by fighting back on the level of sound planning. *Cf.* Bristol Redevelopment and Housing Authority v. J. B. Denton, 198 Va. 171, 93 S.E.2d 288

Counsel for the prospective private redeveloper will soon find that an urban redevelopment project is "just another real estate deal" in the same limited sense that Alfonso's first evening with Lucrezia Borgia was "just another blind date." In both instances, a wise mentor will urge the suitor that boldness be preceded by research and that desire be tempered with caution. In fact, the problems have seemed so great and the pitfalls so deep that many experienced real estate men have been unwilling to bid for sponsorship of urban redevelopment projects, even in their home cities. No segment of the field of real estate development involves contact with so many public agencies—federal, state, and local. Some realtors believe that time-consuming negotiations with a multitude of government agencies will prevent the smooth flow of construction that is essential for efficiency. Others believe that the pioneering projects will be unprofitable until the new neighborhoods are well established, and that they should enter the field only after bad experiences have produced better procedures.[5] Some fear that the "608 scandals," which engendered public suspicion and resentment of the home-building industry, may be repeated.[6] Only a very few American businessmen have, therefore, chosen to specialize in so difficult a field.[7]

Counsel for the redeveloper thus assumes a challenging responsibility in helping

(1956), in which the LPA's findings of slum and blight were overruled, in large part, because of impressive statistical evidence introduced by the plaintiff. *But cf.* Taft Hotel Co. v. HHFA, 262 F.2d 307 (2d Cir. 1958), *cert. denied*, 359 U.S. 967 (1959), where the Court refused to examine plaintiff hotel company's contention that the plan was unreasonable in providing for a second hotel so near to plaintiff; Kaskel v. Impellitteri, 306 N.Y. 73, 115 N.E.2d 659 (1953), *cert. denied*, 347 U.S. 934 (1954), where the court indicated that judicial review of planning decisions should be limited to those made "corruptly or irrationally or baselessly" and paid little heed to the report of a distinguished planner submitted by the taxpayer opposing the project; Babcock v. Community Redevelopment Agency of the City of Los Angeles, 148 C.A.2d 38, 49, 306 P.2d 513, 520 (1957), where the court stated: ". . . a court is not empowered to substitute its determination for the determination of the agency or the legislative body in the absence of abuse of discretion, fraud, collusion, or bad faith. . . ."

[5] For the difficulties of two pioneering projects, see *A Tower Plus Row Houses in Detroit*, Architectural Forum, May 1960, p. 104; *First Steps Toward a New Washington*, Architectural Forum, Dec. 1959, pp. 114. See also *Builders Tell How Bureaucracy Tangles Renewal*, House and Home, May 1960, pp. 70-71; *Redevelopment—Long Delays from Start to Finish Cost More Than Money*, 16 J. HOUSING 116 (1959).

[6] See Fieger v. Glen Oaks Village, 309 N.Y. 527, 132 N.E.2d 492 (1956), where tenants were not permitted to recover from a landlord who mortgaged for $24,000,000 a property he built for $20,000,000. For a general description of the section 608 program, see Mason v. Hirsch, 140 F. Supp. 453 (E.D.N.Y. 1956). The final stages of the political furor were the attempts to tax the section 608 sponsors. See, *e.g.*, Gross v. Comm'r, 23 T.C. 756 (1955), *aff'd*, 236 F.2d 612 (2d Cir. 1956); *cf.* INT. REV. CODE OF 1954, § 312(j), which, under certain circumstances, taxes any excess of mortgage proceeds over the cost of the mortgaged property. These attempts were generally unsuccessful, except in the cases of those sponsors whose realization of profits after 1949, taxable under the collapsibility rules of INT. REV. CODE OF 1954, § 341, might well have gone unnoticed except for the thoroughness with which all aspects of their projects were investigated. See, *e.g.*, Hartman v. Comm'r, T.C. No. 111 (Sept. 22, 1960). More useful was a tightening of FHA procedures, pursuant to the cost-certification requirements of the National Housing Act, § 227, as amended in 1954, to require a public accountant's audit and certification of project costs to prevent "mortgaging out." 68 Stat. 607 (1954), 12 U.S.C. § 1715r (1958). See Seligman, *The Enduring Slums*, in EDITORS OF FORTUNE, THE EXPLODING METROPOLIS 111, 129-30 (1958).

[7] See *Housing Developers Vie for Jobs of Clearing Urban Slums*, Business Week, Feb. 22, 1958, p. 80; M. CARTER MCFARLAND, THE CHALLENGE OF URBAN RENEWAL 22-23 (Urban Land Inst. Tech. Bull. No. 34, 1958). Only in the United States have urban renewal specialized builders developed. See Schut, *Urban Renewal*, in INTERNATIONAL SEMINAR ON URBAN RENEWAL, REPORT 11, at 13 (1958).

guide the sponsor of a redevelopment project from the selection of the project for which to bid through the profitable operation or sale of a completed real estate enterprise. The path to success winds through a maze of legal problems ranging from the present status of the Rule in Dumpor's Case[8] to whether in 1961 an association of tenants has any more right to picket than did a workmen's combination in 1896.[9]

Counsel for the redeveloper must remember, in rendering his opinion on each problem and in reviewing the decisions to be made by his client, that the success of the particular project is a matter of great public concern not only because large amounts of public money have been invested, but also because the very future of the city may depend to an important extent on the success of the redeveloper in revitalizing the area for which he has been awarded sponsorship. In the antique platitude, urban redevelopment is "affected with a public interest," and counsel for the redeveloper will be wise to use the general approach of the public utility lawyer—being as sensitive to current public opinion and political trends as to the applicable regulations in gauging the limitations within which the redeveloper's legitimate desires must be adjusted to the requirements of the many public agencies involved.[10] The quickest way to sense the broad issues in urban redevelopment and to become acquainted with its jargon is background reading in the nonlegal materials.[11] (Legal materials, until recently, have been largely confined to the constitutionality of using eminent domain to acquire private property for urban

[8] Dumpor's Case, 4 Coke 119b, 76 Eng. Rep. 1110 (K.B. 1578); JOHN WILLIAM SMITH, A SELECTION OF LEADING CASES ON VARIOUS BRANCHES OF THE LAW 32 (11th ed. by T. W. Chitty, J. H. Williams and Herbert Chitty 1903). In land disposition agreements, the LPA generally wishes all of the rights of the sponsor to be nonassignable, at least until construction is completed. For the effect of a nonassignment provision subsequent to a consent to the assignment to an affiliated corporation, see generally, Annot., 31 A.L.R. 153 (1924), 32 A.L.R. 1080 (1924). See also CHARLES M. HAAR, LAND-USE PLANNING 597 n. 34, 598 (1959), concerning the validity of restrictions on resale without LPA permission.

[9] *Compare* notes 228, 229 *infra, with* Vegelahn v. Gunter, 167 Mass. 92, 44 N.E. 1077 (1896).

[10] See Harbeson, *The Public Interest Concept in Law and Economics*, 37 MICH. L. REV. 181 (1938). We are not suggesting here that a completed privately-owned redevelopment project should be treated as a separate property classification for legislative purposes. Rather, we are suggesting that pending successful completion, there is a legitimate public concern with the progress of the project that will influence the attitudes of government administrators, of newspapers and other public information sources, and, indeed, of the courts. Even after completion, by covenants in the disposition documents, some public agencies may try to retain some controls, and the public funds invested will leave a community feeling of legitimate public concern with operations.

[11] The *Journal of Housing*, a monthly (except August) publication of the National Association of Housing and Redevelopment Officials, 1313 East 60th St., Chicago, 37, Ill., is the best source of current general news. The Association also offers, by subscription, a Renewal Information Service. Architectural Forum magazine has a continuing interest in the design aspects of redevelopment, with occasional treatment of financial and legal aspects. The best compilations of material for general reading are COLEMAN WOODBURY (ED.), URBAN REDEVELOPMENT: PROBLEMS AND PRACTICES (1953); COLEMAN WOODBURY (ED.), THE FUTURE OF CITIES AND URBAN REDEVELOPMENT (1953); two-part symposium, *Land Planning in a Democracy* and *Urban Housing and Planning*, 20 LAW & CONTEMP. PROB. 197, 351 (1955). All the legal aspects of modern planning are surveyed in HAAR, *op. cit. supra* note 8, which should be compared with the older real property casebooks by those interested in the extent to which law school courses have started abandoning the study of some of the traditional real property topics. For an excellent recent treatment of renewal problems, see Note, *Urban Renewal: Problems of Eliminating and Preventing Urban Deterioration*, 72 HARV. L. REV. 504 (1959); for an earlier treatment, see Johnstone, *The Federal Urban Renewal Program*, 25 U. CHI. L. REV. 301 (1958);

redevelopment.)[12] The best way to develop practical knowledge is, of course, conversations with the government officials heading the national and local programs. A great many of them became administrators of urban redevelopment after holding legal or planning posts, and they are, in general, able, informed, and articulate.[13]

Increasingly as the stage of land disposition is reached in more and more cities,[14] detailed urban renewal manuals with the viewpoint of the lawyer in private practice will be needed.[15] Meanwhile, the following outline for such a manual, organized in the chronological sequence in which the private lawyer is likely to encounter different problems, may be useful to the neophyte. Because the writers have had experience with urban redevelopment in more than a dozen states, they appreciate the likelihood that general comments may not fit the local law applicable to a particular project, but limitations of knowledge and space obviate any attempt to cover comprehensively the local law aspects of the problems discussed. Particularly because one of the writers has served the government as well as private clients in housing matters, they also are conscious of the restrictions within which officials must work when in charge of subsidy and guarantee programs; but their material will emphasize the redeveloper's needs and thus may necessarily, now and then, seem to ignore the problems faced by public officials. The writers are anxious to leave no such impression. In every instance, the private lawyer must have a good command of the applicable local law (or, if he and his client are both from another area, engage a good local lawyer as associate counsel); and he will also best service his client if he has a full appreciation that the client's problems must be solved not only expeditiously, but in a manner consistent with both the fact and the appearance of proper conduct of public business.

and for a brief treatment, see Kass, *Short Primer on Urban Renewal*, Boston B.J., Sept. 1959, p. 14. The Public Library of the District of Columbia has issued annually since 1956 *Publications Relating to Urban Renewal*, which supplements the *Urban Renewal Bibliography* published in 1955 by the American Council to Improve Our Neighborhoods; another useful list of publications is the HHFA index of articles entitled *Housing References*.

[12] See, *e.g.*, Mandelker, *Public Purpose in Urban Redevelopment*, 28 TULANE L. REV. 96 (1953); Weiss, *Is the Power of Eminent Domain Dangerous Under the Urban Redevelopment Act*, 57 DICK. L. REV. 326 (1953); Note, *Public Use as a Limitation on Eminent Domain in Urban Renewal*, 68 HARV. L. REV. 1422 (1955).

[13] See Jacobs, *Redevelopment Directors—What Talents Do They Need? What Incentives?*, 16 J. HOUSING 45 (1959).

[14] By the end of 1959, land disposition had been completed in only 51 of the 699 urban renewal projects that had been approved for federal assistance through that date. The projects were located in 417 communities ranging in population from 570 to 7,900,000 and were situated in 42 states, the District of Columbia, and Puerto Rico. 13 HHFA ANN. REP. 271-73 (1959).

[15] An address by B. T. Fitzpatrick entitled "The Private Redeveloper in the Urban Renewal Program" (copies available from the Municipal Law Service Letter, 3400 Chestnut St., Philadelphia 4, Pa.) is practically the only available item from the point of view of counsel for the redeveloper, other than the form kit of the National Association of Home Builders. See *Example Case: Urban Renewal Project Under Section 220*, 15 J. HOUSING 106 (1958). For the view of the redeveloper, see Scheuer, *Developing Proposals*, in INTERNATIONAL SEMINAR ON URBAN RENEWAL, REPORT 59 (1958), and in JAMES M. MILLER (ED.), NEW LIFE FOR CITIES AROUND THE WORLD 45 (1959). See also Pollock, *Urban Renewal in New York City and the Investor*, 14 RECORD OF N.Y.C.B.A. 515 (1959), which primarily discussses problems peculiar to New York City's now-abandoned disposition procedures under which the sponsor handled relocation and demolition.

I

DECIDING WHETHER TO BID FOR A PROJECT

The redeveloper's first question is the extent of the experience of the different government agencies concerned with the particular project and how well they are coordinated. The LPA may be "any state, county, municipality, or other governmental entity or public body" authorized to undertake urban renewal projects.[16] Nearly all of the LPAs are cities, housing authorities, or redevelopment agencies whose jurisdictions are city-wide only. The LPA may or may not also be responsible for public housing. In any event, it can be politically potent or at cross purposes with the mayor and city council, and it can gear site clearance with tenant relocation into available public housing ably or poorly. An astute LPA director will have involved the local Federal Housing Administration (FHA) office in his planning very early[17] and will also have sought to interest local banks and commercial and citizen groups in the project. In certain cities, redevelopment progress has been a vote-getting political issue,[18] and LPA staffs have enjoyed strong political and widespread public support. In other cities, misunderstandings and lack of information have lost public and political support for the redevelopment program. A good test for the prospective redeveloper is whether the LPA director, the local FHA director, the mayor, and other local administrative and legislative officials involved in the program are on a first-name basis. If they are not, the occasional administrative and legislative adjustments required as the project planning proceeds may become so difficult and time-consuming that the economic feasibility of the project will be impaired.

A. Local Statutes and Ordinances

In deciding whether to bid for sponsorship of a particular project, the redeveloper will require from his attorney information on any special advantages or disadvantages that the statutes and ordinances applicable to the project include. Occasionally, these will be mentioned in the publicity issued by the LPA in soliciting bids for the project or in the formal bid documents. More often, they are not publicized, but are known to the staff of the LPA and willingly discussed upon inquiry.[19] Such lack of publicity does not indicate deliberate suppression; often the LPA officials do not realize the uniqueness of the local advantage or disadvantage and the significance of it to the redeveloper.

One of the most important special local advantages for which the prospective redeveloper's attorney should check is some form of real estate tax abatement. This abatement usually expires after a stated period of time. Real estate taxes often

[16] 63 Stat. 421 (1949), 42 U.S.C. § 1460(h) (1958).

[17] URBAN RENEWAL MANUAL § 14-4-2, at 3, instructs the LPA to consult with the local FHA and advise HHFA of results.

[18] "This year for the first time renewal will be an issue in a presidential election." Editorial, Architectural Forum, June 1960, p. 83.

[19] The LPA is required to report to the HHFA any provisions for special taxation limitations, exemptions or relief. URBAN RENEWAL MANUAL § 14-2-2, at 4(6).

amount to twenty per cent or more of gross income and thirty per cent or more of total operating costs for residential properties, and even higher percentages for commercial properties.[20] The reduction in rents made possible by tax abatement thus can make a substantial difference in the economic feasibility of a project. Indeed, real estate tax abatement is almost always more important in reducing rents than a write-down of land prices below fair re-use value.[21]

Often local officials will predict or even promise lower assessments, and in most instances, an informal abatement will be obtained. Such unenforceable oral commitments, however, are subject to political whims and pressures and to the election or appointment of new officials. Such commitments are also subject to attack by other property owners who are given no such tax relief and who cannot understand why the redeveloper should receive preferential treatment with no legislative standards and controls.[22] The very least that should be made available is a public letter from the appropriate official to all bidders. A far sounder basis is a statutory real estate tax concession, such as is offered in Michigan, Minnesota, Missouri, New York, Wisconsin, and other states.[23] Sometimes the real estate tax abatements continue only

[20] See Nelson, *FHA Operating Expense Data in 608 Housing*, Appraisal Journal, Jan. 1957, p. 8.

[21] See MCFARLAND, *op. cit. supra* note 7, at 20-21. For example, if land cost is $50,000 in a project with a total cost of $1,000,000 and the debt service (interest, FHA annual mortgage insurance premium, if applicable, and amortization of mortgage principal is 7%, getting the land free would save $3,500 per annum. If, on the other hand, the same project is appraised for real estate tax purposes at $400,000 (40% of total cost) and taxed at $35 per $1,000 of appraised value, a 50% tax abatement would save $7,000 per annum. Since write-down of land cost below fair reuse value is not politically feasible, but stabilizing real estate taxation of the new redevelopment at what the predecessor slum structure paid does have political acceptability, tax abatements are both a more powerful and a more feasible incentive than write-downs of land cost. (It should be noted that the foregoing illustration is concerned with a write-down of fair reuse value and presumes the initial write-down from acquisition cost to fair reuse value. The initial write-down from acquisition costs to fair reuse value, however, may be greater than the fair reuse value and is not considered in the foregoing comparison.) It has been argued that the city makes a net gain by the reduced cost of municipal services when the slum is replaced, even if real estate taxes remain the same. See ROBERT B. NAVIN, AN ANALYSIS OF A SLUM AREA (1934); see also Blum & Bursler, *Tax Subsidies for Rental Housing*, 15 U. CHI. L. REV. 255 (1948).

[22] In Boston, Prudential Life Insurance Co. warned that other property owners would test the constitutionality of an informal tax abatement promise, had to threaten abandonment of a multimillion dollar project to secure legislative affirmance of such informal abatement promise that it reluctantly accepted when a statutory abatement was held unconstitutional in Opinion of the Justices, 332 Mass. 769, 126 N.E.2d 795 (1955). Subsequently, the second proposed scheme was held unconstitutional in Opinion of the Justices, 167 N.E.2d 745 (Mass. 1960), but with a broad hint as to how a constitutional solution could be found. See also Business Week, June 4, 1960, p. 38; *Tax Tricks Designed to Do In Slums*, 16 J. HOUSING 232, 234 (1959). For the story of another broken LPA informal promise—in this instance a promise to cut a major street through Washington Square, New York City, to connect a luxury apartment with Fifth Avenue—see *Inhuman Redevelopment*, Architectural Forum, Sept. 1958, p. 89.

[23] See Hershman, *Legal Measures for Removal of Slum Areas*, 14 RECORD OF N.Y.C.B.A. 144 (1959); MICH. ANN. STAT. § 5.3058(12) (1948); MO. ANN. STAT. § 353, 110 (1953); WIS. STAT. ANN. § 66.409 (1957) (assessment freezes); N.Y. UNCONSOL. LAWS §§ 3312, 3426 (McKinney, Supp. 1960); MINN. STAT. ANN. § 462.651 (Supp. 1959) (tax relief). In several other states, there are real estate tax-abatement provisions for cooperatives, but because of the mechanics by which FHA § 213 cooperative apartments are owned and operated, it is presently doubtful whether such projects can qualify under some of these statutes. Attempts are being made, however, to eliminate the mechanical problems here. Exemption of new residential buildings from taxation for the initial five years after construction was held unconstitutional under the state constitution in Opinion of

so long as there is public regulation of rents or profits.[24]

Although the Missouri statute is limited to domestic corporations organized under a special statute, and thus restricts the redeveloper to this particular form of entity,[25] it is an unusually good model in other respects. First, it gives the maximum abatement during the initial five years, when the project is most likely to need help. Second, the benefits are automatically received by those who qualify, thereby eliminating political pressures. Third, it ultimately restores the property to full taxation, so that the redeveloper is helped when needed but the municipality's budget is not permanently deprived of these tax revenues.[26]

It is important, however, to note in this regard that sometimes a municipality finances its share of the cost of land acquisition through the sale of revenue-type bonds to be repaid out of the increase in real estate taxes derived from the redeveloped property in the project as a result of the increase in assessed valuation.[27] On this basis, urban redevelopment has been "sold" in a number of communities, with the assurance that there will be no ultimate cash cost. Under such circumstances, tax abatement is most likely not feasible.

Another important statutory advantage may be state assistance to middle-income housing, such as the New York State Mitchell-Lama Act.[28] The very substantial advantages in interest rate, direct loan, and length of repayment period may make economically feasible projects that otherwise would be impossible.

The disadvantages of a particular locality are more difficult to ascertain than the advantages because they are buried in codes and ordinances with which lawyers seldom deal except in connection with specialized problems. Most redevelopment projects are in the central city and, therefore, are in the most restrictive fire zone. Building codes intended for fire protection of multistory, high-density residential and commercial structures often produce major cost increases when applied to garden apartments with twenty-five per cent land coverage, and yet fire chiefs frequently oppose any relaxation.[29] Zoning must also be checked against the modern planning concepts that the redeveloper's architects may intend to use.[30] The attorney's duty

the Justices, 324 Mass. 724, 85 N.E.2d 222 (1949). There may also be equal protection and due process issues under the federal constitution. See Opinion of the Justices, 332 Mass. 769, 126 N.E.2d 795 (1955).

[24] See statutes cited in Opinion of the Justices, 334 Mass. 760, 135 N.E.2d 665 (1956); Dorsey v. Stuyvesant Town Corp., 299 N.Y. 512, 87 N.E.2d 541 (1949).

[25] See *infra* pp. 139-40, 157-62, re choice of entity to be owner.

[26] The FHA in its rent and expense protections may require the redeveloper to accrue during the early years against future real estate taxes, thus blunting, in part, the advantage of the abatement in attracting initial tenants.

[27] CAL. HEALTH & SAFETY CODE § 33950; MINN. STAT. § 462.545 subd. 5 (1953). See also Note, *Urban Renewal: Problems of Eliminating and Preventing Urban Deterioration*, 72 HARV. L. REV. 504, 513 (1959); *Buffalo's Beginning*, 15 J. HOUSING 102 (1958).

[28] N.Y. CONST. art. 18, §§ 2, 6 authorize financial assistance as well as tax relief. For a summary of the Mitchell-Lama provisions, N.Y. PUB. HOUSING art. XII, see *Government Aids for Private Middle Income Housing in New York City*, 15 J. HOUSING 26 (1958). For recent New York proposals, see TASK FORCE ON MIDDLE INCOME HOUSING REPORT (1959).

[29] *E.g.*, in one city, fire walls were required that not only impaired design, but also put the project at a cost disadvantage compared to suburban apartments necessarily reflected in rentals.

[30] See Goldston & Scheuer, *Zoning of Planned Residential Developments*, 72 HARV. L. REV. 241 (1959).

here is to suggest that these problems may exist and should be cost-checked, since architects sometimes will assume the code can somehow be ignored or, in the early stages of designing the project, will fail to emphasize to the redeveloper the extent to which construction costs have been increased by items that do not increase rentability.[31]

A second important problem area is whether the legality of the whole redevelopment process has already been established. If the constitutionality of the enabling legislation has been judicially determined, if the land acquisition has been judicially sanctioned, and if land disposition procedures have been carefully tailored to local law, long delays and harassing litigation will be avoided. If any questions do exist with reference to legality, they should be discussed with the counsel of a good local title insurance company. As a practical matter, if title insurance has been issued to the LPA on its acquired project land, similar insurance should be available to the purchaser-redeveloper. At least informal soundings should be made, however, to make sure that the low face value title guarantee given on land at the time of acquisition will be extended to title insurance of vastly greater face value on land and improvements after disposition.[32]

A careful check must also be made of state antidiscrimination statutes and municipal ordinances relating to discrimination in construction employment and in occupancy. Sometimes these are of general application, and sometimes they apply by express provision or by court decision only to governmentally-aided projects. In some localities, the lack of public acceptance of such antidiscrimination measures is likely to project the redeveloper into the middle of a major social question, particularly if they do not apply generally to all rental housing in the locality.[33]

B. Civic Groups

Nongovernmental assistance of considerable importance to the redeveloper may be available from local civic groups. In many instances, the civic groups have confined their efforts to public relations programs, contributions to study projects, and the support of needed legislation.[34] This type of assistance is of tremendous help to a

[31] See note 29 *supra*.

[32] Because FHA requires ATA mortgagee insurance (a type of title insurance standardized by the American Title Association that insures against defects off the record as well as defects disclosed by the record) and the mortgage is a very high percentage of total project value, redevelopers often waive the title guarantee (in the face amount of land cost) usually supplied by the LPA and have an amount equal to the cost of such a title guarantee applied by the title company against the cost of the ATA policy. This leaves the equity uninsured, but as a practical matter, almost any claim that could affect the very thin equity would also affect the very large mortgage and be contested by the title company on behalf of the mortgagee. Of course, as the size of the redeveloper's equity increases, the argument becomes less applicable. Professor Haar raises the question as to why the passage through condemnation does not create good title. HAAR, *op. cit. supra* note 8, at 562 n.16. Where abstracts of title are used, the LPA is authorized to deliver them to the redeveloper at the time of conveyance. See URBAN RENEWAL MANUAL § 13-4-21, at 5.

[33] Some local ordinances apply only to buildings with, for example, five or more suites, and others only apply to government-aided housing. Also see *infra* p. 173.

[34] See 17 J. HOUSING no. 1 *passim* (1960).

redeveloper unfamiliar with local conditions. In numerous instances, such groups have persuaded reluctant local bankers to make the necessary construction loans for the project. Such groups with access to public opinion media often create an awareness of urban redevelopment that results in effecting a high degree of coordination between the municipal and local federal officials. Their personal acquaintanceship with members of Congress is often useful in expediting Washington administrative decisions.

A singularly effective civic group has been the Cleveland Development Foundation, which raised a revolving fund of two million dollars to make supplemental unsecured loans that, added to FHA mortgage financing, have meant that redevelopers in Cleveland, Ohio, have been required to invest a minimum of cash in their projects.[35]

Civic leaders throughout the country are increasingly recognizing the importance of the economic as well as the human aspects of urban redevelopment and are beginning to appreciate the economic stimulus given their own enterprises by the rebuilding of the cores of their cities.[36] It can be anticipated that civic groups will plan a more influential role in urban redevelopment than in the past.

C. Visiting with LPA Officials and Inspection of Site

An important step prior to making a final decision to enter a bid for the project is a visit by the proposed redeveloper, his architect, and his counsel to the city to confer with the LPA officials and to examine the site of the proposed project and its surrounding neighborhood.[37]

Physical inspection of the proposed project site may reveal a good deal of information as to probable fill requirements, sewer problems, foundation difficulties, air pollution, accessibility of public transportation, and so forth. More important, it will provide an opportunity to examine the schools, shopping facilities, and municipal services, such as street lighting, that service and support the proposed project. Unless the LPA and the community have planned for "total redevelopment"[38] and have properly timed the different components of it, the redeveloper may conclude that the carrying costs for the period between the time he completes his project and

[35] See *Hearings Before the Subcommittee on Housing of the House Committee on Banking and Currency*, 85th Cong., 2d Sess. 34 *et seq.*, 316 (1958).

[36] See *The Businessman's Stake in Urban Renewal*, Architectural Forum, Nov. 1959, pp. 146-47. Also see SEARS ROEBUCK & CO., URBAN RENEWAL DIVISION, CITIZENS IN URBAN RENEWAL (1959), which is an interesting example of the extent to which one major corporation feels an obligation to participate in urban renewal and has urged its executives "to assume a leadership role in the field of urban renewal."

[37] This visit should be for the purpose of obtaining information and not for obtaining publicity. The latter type of visit is the more common type of one. See Sullivan, *supra* note 4, at 140-41: "The 'big real estate operator' has become a folk-type. With much fanfare he arrives in the survey city on the invitation of business and civic leaders. He travels rapidly about, 'taking everything in,' and is gone again as quickly as he arrived. But he often leaves behind a more or less concrete suggestion—for example, that a project embracing a convention hall, a hotel and a clutch of luxury apartment houses would be ideal for the area between Main Street and the river."

[38] See *infra* p. 174.

the time of the availability of the essential supporting services may undermine the project's economic feasibility. Nothing but personal investigation will uncover whether the LPA has a really effective and coordinated plan for total redevelopment.

At the same time, the availability of the various federal aids for the particular project should be preliminarily checked out. Has the Housing and Home Finance Agency (HHFA) Administrator certified to the FHA, the Urban Renewal Administration (URA), and the Federal National Mortgage Association (FNMA) that federal assistance may be made available for the project?[39] Has the area in which the project is located been designated, if necessary, an FHA high cost area?[40] Federal aids change from time to time, and the redeveloper who is relying upon them should be sure the proposed project will be eligible.

Finally, the redevelopment plan and the general program of land disposition should be thoroughly discussed with the staff of the LPA. The prospective redeveloper's counsel and architect should, in particular, check through the redevelopment plan carefully. Although this is a generalized document, the legal effect of which is still open to question,[41] it often contains zoning or other provisions that become troublesome later on.[42] The programs of land acquisition, relocation, and demolition should be reviewed to ascertain (a) the probable timing of conveyance of land to the redeveloper, and (b) whether any unsual obligations are to be imposed upon the redeveloper. For example, the unique procedure that has been used by New York City put the full task of site management, tenant relocation, and demolition, as well as redevelopment, on the redeveloper. This did not work well. It gave the irresponsible redeveloper an opportunity to turn a quick profit as a slum landlord,[43] and discouraged responsible redevelopers from participation because they did not want to undertake site clearance functions with related problems of tenant relocation.[44]

At the conclusion of his visit to the city, the redeveloper, with his architect, counsel, and accountant, should consolidate the factual information that has been

[39] National Housing Act of 1949, § 101(c), 63 Stat. 414, as amended, 70 Stat. 1103 (1956), 42 U.S.C. § 1451(c) (1958). The activities of the Administrator consist of review, approval and certification of Workable Programs, determination that the relocation requirements of Title I of the Act have been met, and certification to the FHA Commissioner of the eligibility of the urban renewal project for mortgage insurance under § 220 of the Act. See 12 HHFA ANN. REP. 29 (1958). Letter No. 32 of the Deputy Commissioner of the FHA, entitled "Policy Considerations in Section 220 Processing," Nov. 13, 1956, states that FHA can rely on certifications by the HHFA Administrator as to the eligibility of a project for section 220 mortgage insurance and that ". . . reasonable doubts as to acceptability of any aspect . . . including marketability, should be resolved in favor of acceptance of the project proposals . . . ."

[40] Higher mortgage limits are available if an area is designated a "high-cost" area. See *infra* note 131.

[41] See Haar, *The Master Plan: An Impermanent Constitution*, 20 LAW & CONTEMP. PROB. 353 (1955).

[42] See Goldston & Scheuer, *supra* note 30, at 262, 263.

[43] See *The Future of Title I*, Architectural Forum, Sept. 1959, p. 107; Cook & Gleason, *The Shame of New York*, 189 THE NATION 287 (1959).

[44] It has been suggested that ". . . the relationship of landlord and tenant . . . [is] the second most passionate relationship known to mankind. It could never have been truer than in the case of tenants being uprooted to make way for new improvements." Hershman, *The How and Why of Title I*, 14 RECORD OF N.Y.C.B.A. 506, 511 (1959).

gathered into an analysis of the economic feasibility of the project.[45] In this connection, the basic economic health of the city and the region should be checked by the available indices of population and business growth, such as bank deposits, car loadings, and utility company load projections. If the necessary level of rents appears attainable for the project that can be built in the project area, then the redeveloper is ready to delve into the more detailed requirements of the LPA's bidding procedures. The redeveloper may wish to check his conclusions with the local FHA office that is directed to review, in a pre-application processing, the redeveloper's analysis of the project's economic feasibility.[46]

II

PREPARING TO BID FOR SPONSORSHIP OF A PROJECT

As soon as the redeveloper decides to bid for the sponsorship of a particular project, his counsel should meet with counsel for the LPA to discuss in detail the LPA's program for disposition of the project.[47] The LPA may have its own staff attorney; it may use the city law department; or it may engage an attorney in private practice. In any of these events, the LPA counsel in many cities will thus far have had little experience with land disposition. He will have been busy with the arrangements between the LPA and the federal agencies and with his condemnation work; so that, at best, he may have read through the land disposition sections of the *Urban Renewal Manual*[48] and annotated his copy of the Guide Form of Contract for Disposition of Land for Private Redevelopment[49] with changes required by local law or the particular circumstances of the local project. Counsel for the redeveloper should also familiarize himself with these materials. The Guide Form of Contract will be discussed in more detail below; the Manual, revised February 1, 1960, is published by the HHFA and prescribes the federal policies, procedures, and requirements applicable to the LPA's carrying out slum clearance and urban renewal projects under Title I of the Housing Act of 1949, as amended.[50] Of particular interest to the instant topic is part 14, entitled "Land Disposition." Although this *Manual* is subject to interpretation and revision, it, nevertheless, represents the present policy of the federal government with respect to urban renewal, and it lays down the ground rules within which LPAs and redevelopers may negotiate. In many particulars, the LPA may require more from the redeveloper than the requirements of the *Manual*.

[45] One way of so analyzing the project is by use of an FHA Form 2013. See *infra* p. 154.

[46] FHA Operations Letter No. 178, Dec. 12, 1955, p. 7.

[47] For an excellent review of the functions of an LPA attorney, see Dagen, *Staff Attorney's Role*, 15 J. HOUSING 280 (1958).

[48] The *Manual* is available to the public through the Superintendent of Documents on a subscription basis. The *Urban Renewal Manual* supersedes the previously issued *Local Public Agency Manual*.

[49] See note 87 *supra*.

[50] 63 Stat. 413, 42 U.S.C. § 1441 (1958).

A. Selection of a Method for Land Disposition

The first question that counsel for the redeveloper should cover with the LPA attorney is how far land disposition has, thus far, proceeded. Sometimes the LPA will not have decided what method of land disposal it will use. In the case of land to be used for private redevelopment (and it is only with such redevelopment that this article deals), one or more of the following disposal methods (the first five of which are regarded as disposal under open competitive conditions[51]) may be selected by the LPA with the approval of the HHFA:

1. Sealed-bid offering.
2. Public auction.
3. Negotiated disposal under open competitive conditions.
4. Public auction with guaranteed minimum bid.
5. Fixed price offering with bidding on other than price basis.
6. Predetermined-price offering.[52]
7. Negotiated disposal (under other than open competitive conditions).[53]

Although all of the above disposal methods have been suggested and approved by the HHFA, the LPA may be subject to state and local as well as federal limitations on the disposal of land. In some states—for example, North Carolina—competitive bidding is required in the disposition of urban renewal land.[54] In some other states—for example, California—public bidding is not required, but a public hearing is.[55] The LPA attorney should know if any state or local requirements eliminate some of the federally-approved methods.

If the LPA has not yet chosen among the disposition methods available to it, the redeveloper may decide to try to persuade the LPA to adopt a particular method. Urban renewal is a public matter, and anyone is at liberty to recommend to the LPA how it can best dispose of project land. If, for example, a redeveloper believes that his offer will be the highest land price, he may seek to have the land disposed of by sealed bid or public auction. If, on the other hand, he feels that he has an edge on his competitors on an other-than-price basis, he may strive for a negotiated disposition. Of course, the extent to which the disposition procedure can be tailored to the desires of a particular bidder depends on the state requirements as to competitive bidding techniques in land disposition.

[51] See URBAN RENEWAL MANUAUL § 14-3-5.

[52] Disposal by a predetermined-price offering is a special method intended to be limited to the sale of individual lots in a residential, commercial, or industrial subdivision, or to preferential sales to former occupants and owners.

Land may be offered at a fixed price, with the competition among prospective redevelopers on some other criterion, if this method will contribute significantly to the achievement of an important urban renewal objective such as the production of new housing at lowest possible rents or sales prices. See *id.* § 14-3-4.

[53] See *id.* § 14-3-6.

[54] See N.C. GEN STAT. § 160-464(b) (1952). States are reluctant to invite a fresh round of constitutionality challenges by making changes in their land disposition statutes, even though they seem restrictive, once such statutes have passed initial court tests of constitutionality.

[55] CAL. HEALTH & SAFETY CODE § 33268. The hearing is not for the purpose of receiving other bids, but merely to review a proposal already accepted subject to public hearing.

In general, LPAs have found that an award on the basis of the highest price bid for the land works best for routine projects intended for moderate-income tenants where the principal goal is to energize cleared land with some sort of sanitary shelter. For centrally located projects intended to revitalize downtown areas, LPAs have found that the best technique is to fix a land price for all bidders and make the award on the basis of architectural aesthetics and design. Several LPAs have tried to mix land price and design criteria, and in almost every case, this has resulted in confused and difficult award determinations.

If the redeveloper can claim any preference, his counsel should, of course, try to see that appropriate recognition of such claim is provided in the disposition method selected. Thus, a redeveloper might be entitled to a preferential position because he is a dispossessee in the redevelopment project area. Federal law, rules and regulations, and also many state and local laws give preferences of one kind or other to owners or tenants within a project area. The HHFA has established procedures for dispositions at predetermined prices, with preferences given to occupants being displaced by projects of the LPA and to owners who desire to relocate structures within the project area.[56] Such preferences can be very valuable, and the redeveloper, even though he is not an owner, occupant, or tenant in the redevelopment project area, might decide, if it is proper under the circumstances, to place himself in such a position before the cut-off date established by the LPA or by applicable law.[57]

The redeveloper might also decide to try to persuade the LPA to select him as a sponsor, conditioned upon preparation by his architects of plans for a satisfactory development and subject to ultimate mutual agreement upon land price and a form of land disposition contract. Such an arrangement is classified by the HHFA as a negotiated disposal under other than open competitive conditions. The HHFA permits the LPA to enter into such an agreement with a redeveloper very early in the undertaking of a project, and the agreement may leave the price and perhaps the parcelization of the land for future determination.[58] The agreement must otherwise

[56] See URBAN RENEWAL MANUAL § 14-3-6. California, for example, in CAL. HEALTH & SAFETY CODE § 33701, provides that every redevelopment plan shall provide for participation in the redevelopment of property in the project area by the owners of all or part of such property, if the owners agree to participate in the redevelopment in conformity with the redevelopment plan adopted by the legislative body for the area. With respect to each redevelopment project, each agency shall, within a reasonable time before its adoption of the redevelopment plan, adopt and make available for public inspection rules to implement the operation of this section in connection with the plan. In Fellom v. Redevelopment Agency of City and County of San Francisco, 157 Cal. App.2d 243, 320 P.2d 884 (1958), *appeal dismissed*, 358 U.S. 56 (1958), it was held that redevelopment may be made without necessity of participation of owners, and that permitting owners of improved property to participate in redevelopment without allowing owners of unimproved property to participate was not unreasonable and discriminatory. The court stated that although the legislature in enacting the Community Redevelopment Law hoped the redevelopment would be possible with the participation and cooperation of the owners of the property within the "blighted" area, it was apparent from the entire law that there was provision for a method of redevelopment without participation by the land owners.

[57] The right to priority is often not clearly defined. See *Some Crucial Questions Raised in Washington, D.C., Renewal*, 16 J. HOUSING 18 (1959), for instance, where both building owner and tenant sought priority to rebuild a restaurant.

[58] See URBAN RENEWAL MANUAL § 14-3-6.

be complete and must contain provisions whereby the price (usually the fair re-use value as agreed upon by the LPA with the federal agencies involved) is to be determined by the LPA. The agreement must provide that if the redeveloper does not accept the LPA's determination within a reasonable time, all rights of the redeveloper to acquire the land shall terminate. These termination provisions may reserve for the redeveloper a right to meet, within a specified reasonable time, any price negotiated with another redeveloper that is (a) less than the lowest price at which the land was offered to the initial redeveloper, or (b) not more than five per cent above the best offer previously made by the initial redeveloper.[59]

Although such an agreement is, in effect, nothing more than an agreement to try to agree, it is a very desirable arrangement from the viewpoint of a redeveloper. Under such an arrangement, the redeveloper can save the great effort and expense of competitive bid presentations (with often a great deal of the expense devoted to renderings and other "showpieces" useful only for the competition).[60] At less cost than a bid presentation, the redeveloper can have his architect work closely with the LPA planning staff in a fairly complete designing job for the particular project.[61] Where an LPA desires or is willing to negotiate with a redeveloper prior to the time that a price for the land is ascertainable and the parcelization thereof is determined, the redeveloper usually will be willing to have his architect undertake such a job because the redeveloper will hope he thereby can get his foot in the door, so to speak, and demonstrate to the LPA that he is fully qualified, financially responsible, and in a position to develop good architectural plans available for immediate use for the particular redevelopment. Even though it is possible that the LPA and the redeveloper ultimately may not agree on price, they will have been put into a working relationship; and if a condition of mutual trust and confidence has been established, the chances are good that the agreement on price will ultimately be reached and a land disposition agreement will be executed. Therefore, if a redeveloper has an interest in a particular redevelopment project in its early stages, he may find it worth the effort to try to persuade the LPA to select this type of disposition.

State or local law may prescribe competitive bidding for some LPAs. Other LPAs may adopt it as the simplest alternative. If the only criterion of selection that the LPA intends to use is the price offered for the land, the auction or sealed bid is, of course, the appropriate method. On the other hand, the goals of the urban re-

[59] *Ibid.*

[60] One redeveloper has stated "that a competitive bid presentation may cost from $35,000 to $50,000 . . ." and further noted that "even the winner's costly plan is not always used in the final project. . . ." *Builders Tell How Bureaucracy Tangles Renewal,* House and Home, May 1960, pp. 70, 71. Another redeveloper has proposed that where redevelopment competitions are based on design, the "huge cost . . . when it is known in advance that the chance in winning is one in five or ten . . . ," should be kept low enough to attract numerous proposals by requiring that "the basis of the competition must be kept simple and presentations must be limited to conceptual plans and simple models. . . ." See Editorial, *The City as "End Product,"* Architectural Forum, May, 1960, p. 91.

[61] See DISTRICT OF COLUMBIA REDEVELOPMENT LAND AGENCY ANN. REP. 17 (1959) for a discussion of how a redeveloper, through the medium of a memorandum of understanding, worked up a complete designing job for Washington, D.C.—Project C area.

newal program are not best achieved by a price competition for land that, necessarily, results in higher rents or a less desirable structure for the same rent.[62] The LPAs generally are aware of this, and in a number of instances, the award has not been made to the bidder offering the highest price for the land. Once it is realized that the FHA and FNMA benefits to which land in an urban renewal area is entitled are more important in facilitating redevelopment than the cost of the land as such, it can be appreciated how shortsighted it is to select a redeveloper primarily on the criterion of land price. This criterion merely awards the whole bundle of federal subsidies to the redeveloper willing to pay the most for them and nullifies much of the modern planning and attractive architecture that the subsidies are intended to encourage. To some extent, the final choice of criteria reflects a three-way tug-of-war between the URA, which is interested in minimizing the federal contribution to "net project cost,"[63] the local FHA office, which is interested in avoiding a land price so high that the economic feasibility of the project will be impaired, and the LPA, which wants an adequate land price but also an attractive redevelopment likely to arouse community enthusiasm for the LPA's program. It should be remembered that the federal statute requires that the LPA obtain the fair re-use value of the land, and not necessarily the highest price bid.[64]

In any event, where permitted by state and local law, the method of disposition most often selected has been negotiated disposition under open competitive conditions.[65] Under this method, negotiations are concluded openly after first issuing

[62] See Lanigan, *The Problem of Selecting Sponsors and Disposing of Land in Title I Urban Redevelopment Projects*, 14 RECORD OF N.Y.C.B.A. 528, 529, 531 (1959).

[63] "Net Project Cost" is generally the difference between all costs of a project to the LPA and the proceeds from disposition of land. This Net Project Cost of an urban redevelopment project is shared by the federal government and the LPA. See URBAN RENEWAL MANUAL pt. 17.

[64] Note, however, the emphasis on price in HHFA ADVISORY BULL. 7-58, ADVERTISING AND MERCHANDISING URBAN RENEWAL PROJECTS, and the criticism of the URA's attitude on land disposition in Editorial, *The City as "End Product,"* Architectural Forum, May, 1960, p. 91. The statutory requirement is merely that urban renewal land be disposed of "at its fair value for uses in accordance with the urban renewal plan." 63 Stat. 413 (1949), 42 U.S.C. § 1450(c)(4) (1958).

[65] See *Survey of Urban Renewal Land Disposition*, Real Estate Analyst, Dec. 24, 1959, p. 58, which contains the following table:

TYPE OF SALE

Land Use	*Fixed Price*	*Negotiations*	*Competitive Bid*	*Combination of Bidding and Negotiation*
Residential	2	19	11	4
Commercial	0	33	5	2
Industrial	0	14	35 (30 in Chicago)	1
Public	3	30	0	1
Semi-public	2	14	0	3
	7	110	51	11

If Chicago's record is taken out of the summary, there would be 104 sales by negotiation and 21 by competitive bidding. Since it is not possible to have competitive bidding on land sold for public use, it may be better to subtract this figure, too, leaving 74 parcels sold by negotiation. Most of the fixed price sales were based on FHA appraisals.

a public invitation for proposals. The invitation for proposals normally establishes, among other things, a cut-off date for the submission of written proposals and the date for publicly announcing the name of each bidder and the amount of his offer. Typical standards and criteria that various LPAs have stated will guide their review and acceptance of a proposal are the following:

1. The degree to which the proposal meets the specifications of the redevelopment plan.
2. The financial responsibility, qualifications, experience, and ability of the bidder to finance and complete the redevelopment.
3. The architectural and planning skills and the ingenuity demonstrated in the proposal; the reputation, experience, and demonstrated ability of the bidder's architects.
4. The economic practicality of the project as proposed by the bidder and the benefit to the community in terms of the sociological, aesthetic, and financial aspects of the proposed project.
5. The price offered in the proposal for the purchase of the property by the bidder, which price must equal or exceed the approved minimum price (which usually is the fair re-use value).[66]
6. The time estimates submitted by the bidder for the execution and completion of his proposed redevelopment project.

B. Typical Bid Documents

When the LPA has selected the disposal method for any parcel or group of parcels, it will then prepare the final bidding and disposition documents. Under a negotiated disposal, a typical set of documents includes the following:

1. Invitation for proposals, including instructions to bidders.
2. Disposition parcel map showing boundaries and dimensions of each area to be offered separately and each area designated in the urban renewal plan for a different use. There usually is indicated on the map, in the invitation to bid or separately, the zoning, the size of each area, usually in square footage, the land use classification of each area, and the proposed or established minimum price for each parcel, usually in square footage. It is becoming more customary for the LPA to indicate the minimum acceptable price (fair re-use value) at the time of its issuance of the invitation to bid. This is usually a price which has been approved by the HHFA and meets the financial requirements of the Loan and Grant Contract between the HHFA and the LPA.[67]
3. Bid form or proposal to purchase real property for redevelopment.

[66] The minimum acceptable price or fixed price established by an offering shall not be less than the estimated fair value of the land for uses in accordance with the urban renewal plan, and any invitation to bid shall provide that the LPA may reject any or all bids. URBAN RENEWAL MANUAL § 14-3-5.

[67] The Loan and Grant Contract, which provides for federal loan and grants money to the LPA, presupposes a budget containing a resale price for the land by the LPA sufficient, together with other sources of income and noncash grants-in-aid, to fulfill the LPA's obligation to contribute one-third of the Net Project Cost. See URBAN RENEWAL MANUAL § 17-1-1.

4. Contract for disposal of the land. This will be, or will be patterned after, the Guide Form of Contract for Disposition of Land for Private Redevelopment, which is made available to the LPA by the HHFA for the guidance of the LPA and its counsel in preparing land disposition agreements.[68] The LPA may, with HHFA approval, add, modify, or omit such of the provisions of the Guide Form as it decides for a particular disposition. These changes should be reflected in the form of contract included in its bid documents and eventually in the contract executed between the LPA and the designated redeveloper.
5. Form of deed. This is a rather elaborate form of deed whereunder the grantee (redeveloper) covenants to comply with the redevelopment plan and the land disposition agreement. The deed may also contain rights of forfeiture, re-entry, and reversion of title reserved by the LPA as grantor in the event of breach of said covenants. If the land is to be leased, there will be, in lieu of a deed, a form of lease containing provisions similar in character to those in the form of deed.
6. Redeveloper's statement of qualifications and financial responsibility.
   a. Redeveloper's Statement for Public Disclosure, the first part of Form H-6004.
   b. Redeveloper's Statement of Qualifications and Financial Responsibility, the second part of Form H-6004.

   The Redeveloper's Statement for Public Disclosure is to be made public by the LPA before it enters into an agreement or contract for, or "understanding" with respect to, each disposition of project land. The Redeveloper's Statement of Qualifications and Financial Responsibility is for the internal and confidential use by the HHFA and the LPA. The purpose of this statement is to enable the LPA to make a determination, concurred in by the HHFA, that the redeveloper possesses sufficient qualifications and financial resources to acquire and develop the land in accordance with the urban renewal plan.
7. Redevelopment plan. This usually consists of a detailed text and maps describing the project area and the use, building and density controls applicable thereto.
8. Declaration of restrictions. This document contains restrictions, covenants, reservations, easements, liens, and charges required by the LPA to provide adequate safeguards that the redevelopment will be carried out pursuant to the redevelopment plan. There may be included or incorporated by reference various documents containing provisions that, in the opinion of the LPA, should be imposed so that the work of redevelopment will be carried out pursuant to the redevelopment plan. The declaration of restrictions is

[68] See pt. IV of this article. See Brownfield, *The Disposition Problem in Urban Renewal*, in part I of this symposium, 25 LAW & CONTEMP. PROB. 732 (1960).

intended to be recorded or filed in the land records of the locality, with the anticipation that it will be legally enforceable and that the recording thereof will give constructive notice of its provisions.

9. Miscellaneous. In addition to the above-enumerated documents, the LPA may provide special market analyses, engineering studies of soil conditions, and re-use appraisals. These are meant to assist the prospective redeveloper in arriving at the price that he will offer for the property and in reaching a determination with respect to the kind of improvements that can best insure economic feasibility. If such information is not included in the packet of documents provided to prospective redevelopers, it can usually be obtained upon request. LPAs have often been somewhat coy in furnishing information regarding re-use appraisals. An LPA may be disappointed with the price put upon its property by the appraisers it has retained and may harbor the hope that some redeveloper will pay more. In any event, the redeveloper should, to the extent proper, obtain all information that the LPA (or possibly the local FHA office) has in its possession regarding re-use value of the property.

C. Revision of Bid Documents

Some LPAs will make unofficial preliminary drafts of the bid documents available and solicit comments thereon from prospective bidders. Other LPAs will not release preliminary drafts but, in a more formal procedure, will provide for the amendment of officially issued documents in response to corrections and suggestions received. In either event, the redeveloper, with his architect and attorney, should go over the bid documents with great care and decide what changes to suggest to the LPA.[69]

It has frequently happened that the land use controls contained in the redevelopment plan, in the declaration of restrictions, or elsewhere, are impractical.[70] For example, a declaration of restrictions may provide for an architectural control committee so organized and constituted as to place an intolerable burden upon a redeveloper. Provision may be made for approval by such a committee of construction plans and specifications prior to the erection or placement of any building, without the establishment of any objective standards to guide the committee. The redeveloper under such circumstances may very well find himself the victim of the whim and caprice of a group of architects lacking objective criteria and with one or more of them unenamoured of the urban renewal program and in disagreement with the economic and social objectives of the LPA.

Counsel should make sure that the architect carefully checks all the documents. The architect might assume that to build in conformity with the redevelopment plan, all he need do is to follow the local building code that has been adopted by the

[69] See Randolph v. Wilmington Housing Authority, 139 A.2d 476 (Del. Sup. Ct. 1958), holding that it is not an unconstitutional delegation of the city council's duty for the redevelopment act to provide that the redevelopment plan may be modified by the LPA with consent of redeveloper.

[70] Rent control provisions may also be inserted. See discussion *infra*, pp. 146-47.

locality; but if he carefully studies all the bid documents, he may, for example, discover that in the redevelopment plan or the declaration of restrictions, there are limitations on distances between buildings, set-backs, minimum floor areas, population densities, and land coverage that are more strict or in some other way different from the zoning ordinance and building code of the locality.[71]

Suggestions for changes are best made while the planning of the LPA is still in the formative stage. This, of course, requires taking an interest in a redevelopment project as early as possible—frequently even several years before the property is offered for sale. It requires the investigation of many projects during their planning periods. A redeveloper can learn of the existence of projects in which he may have an interest by watching the local papers or by obtaining from the HHFA its periodic reports on the status of all current projects.[72]

D. Good Faith Deposits

In addition to the good faith deposit that the HHFA requires at the time of the execution of a land disposition agreement,[73] the LPA may request a deposit at the time of submission of a bid. If this is required in an amount from five to ten per cent of the amount bid for the land, to conform with the amount the successful bidder will eventually be asked to put up as a good faith deposit, it will be a substantial burden to the redeveloper. The redeveloper may well decide not to bid when required to immobilize capital equal to five per cent or more of his offer on the land for six months or more.[74] The redeveloper may have to invest so much in his proposal in the form of expenditures for architectural plans, sketches, and models, market surveys, and promotion, that he will not want to put up any considerable sum in advance of execution of the land disposition agreement. The redeveloper's attorney should, therefore, try to get the LPA to reduce to an absolute minimum or eliminate the bid deposit, with the requirement that at time of execution of the land disposition agreement, a balance will be deposited to bring the deposit up to five

[71] A case in point is the provision that was contained in a Declaration of Restrictions for a project on a steep hill that required that the garage or carport should be so located on a lot that there existed a distance of twenty feet improved as a driveway between the face of the garage or carport and any sidewalk—or if no sidewalk, then street curb. In this particular project area, there were single-family building lots falling off from the planned roadway at grades of forty per cent and greater, and the restriction could be complied with only if wholly uneconomic amounts were spent for grading. Appropriate changes were made by the LPA when this problem was called to its attention.

[72] These reports are available in the *Urban Renewal Project Directory*, which is issued periodically by the HHFA. This directory describes all local project areas with respect to which there is outstanding, as of the current date, the Agency's approval for the execution of plans for an urban renewal or demonstration project to be undertaken by a local community with federal financial assistance, as authorized under Title I of the Housing Act of 1949, as amended, 63 Stat. 414, as amended, 70 Stat. 1103 (1956), 42 U.S.C. § 1451 (1958).

[73] See *infra* p. 144.

[74] URBAN RENEWAL MANUAL § 14-3-5 states that the closing date for the receipt of bids shall not precede the date on which the LPA will be able to deliver title and possession by so long a time as to discourage wide participation in the bidding. Also, the time between these dates is not to increase significantly the burdens or risks of the redeveloper. Generally, six months to one year would be considered to be a reasonable maximum.

per cent of land cost. Even this may be too soon. Since, in any event, the URA will require a good faith deposit in connection with the land disposition agreement, the progress of the LPA in land acquisition and clearance should be carefully observed to determine how long it may be after execution of a land disposition agreement before the LPA will be in a position to begin conveyance of land. If it appears that a considerable length of time will transpire, the attorney should seek to have included in the invitation to bid a provision that the LPA will not require that the good faith deposit be put up prior to a certain time (say, sixty days) from the estimated date on which the LPA will be able to convey the land to the redeveloper.

Because of the uncertainty as to the length of time between the making of the deposit and the conveyance of land, whether it be at time of bid or at time of execution of a land disposition agreement, the redeveloper will prefer to supply a surety bond instead of cash or government bonds in order to prevent "freezing" of his working capital. Even if the surety company requires collateral in the form of negotiable securities, this probably will be simpler, more economical, and more flexible than putting up cash or bonds with the LPA.

E. Land Preparation

The redeveloper, in deciding what price to bid for the land, must carefully determine the extent of the LPA's participation in land preparation and the type of cooperation agreements the LPA may have with the city and the utilities serving the project area. The redeveloper's attorney should carefully check such cooperation agreements, and if the agreements have not been executed, he may be able to recommend provisions that would be of benefit not only to all prospective redevelopers, but to the LPA and the project itself. Ordinarily the city or utility companies will bring electricity, water and gas, storm drains, and sewer lines up to the project boundaries. The extent to which such services will be carried into the project area at the cost of the city or utility companies varies considerably. It is extremely important for the redeveloper that he distinguishes between on-site and off-site utility work for which he will have to pay in whole or in part. The FHA will not give credit for off-site work in its mortgage calculations, since the property will not be subject to the mortgage, so the redeveloper will be especially concerned about off-site utility costs.[75]

A standard land disposition agreement will provide for the installation and relocation (by the LPA itself or by appropriate public bodies or public utility companies)

[75] See 24 C.F.R. § 263.7(b) (1959). See also § 220(d)3(B)(ii) of the National Housing Act, which states that the mortgage may include ". . . the land, the proposed physical improvements, utilities within the boundaries of the property or project. . . ." 72 Stat. 73, 12 U.S.C. § 1715k(d)3(B)(ii) (1958). One redeveloper, for instance, constructed a wall around a number of house lots. The FHA attributed the value of the improvement equally to each house, ". . . so, they would only allow it on the outside houses of the development, and we ended up with some $2,000 per house more valuation than we could use on the outside houses, and nothing on the inside ones." *Builders Tell How Bureaucracy Tangles Renewal*, House and Home, May 1960, pp. 70, 71.

of such sewers, drains, water and gas distribution lines, and electric, telephone, and telegraph installations (exclusive, in each case, of house or building service lines), as are to be installed or relocated pursuant to the redevelopment plan.[76] In a normal situation, street paving, installation of gutters, curbs, street lighting, sidewalks, and public rights of way will also be provided by the LPA. The redeveloper should be extremely cautious, however, whenever his design and construction plans call for so-called superblocks. The normal rule requiring the redeveloper to bear the cost of utility lines placed in his private property will result in allocating to the redeveloper a higher than normal share of the total cost of such utilities, since the superblock replaces many dedicated highways with private drives and walks. The distorted cost sharing is more than a matter of allocating lineal feet. Very expensive utility trunk lines, always located in public areas under the traditional grid street layouts, may be placed on the redeveloper's private property in a superblock and charged to him.

In the usual situation, preparation of land for redevelopment by the LPA will include the demolition and removal to grade of all existing building structures and other improvements on the property, including the sufficient breaking up of all basement floors to permit proper drainage and the removal of any debris resulting from such demolition. The land preparation will include removal of all curbs, gutters, sidewalks, utility lines, installations, facilities, and related equipment that are to be eliminated or removed pursuant to the redevelopment plan. In addition, it is customary for the LPA to provide such filling and grading and leveling of the land (but not including top soil or landscaping) as shall be necessary to make it ready for the construction of improvements to be made thereon by the redeveloper.[77]

The redeveloper should be careful to ascertain in what condition the LPA will leave the actual building site. Normally, the LPA will not agree to obligate itself to do any building site preparation work. However, most LPAs will agree to remove all excess earth materials that may have been moved onto any building site, so that no site will be rendered inaccessible or unbuildable. In figuring redevelopment costs, it is important to make sure whether the LPA will provide buildable sites and whether, to conform to FHA valuation practices, the cost of unusual foundation work will be compensated for by a reduction in the price for the land if there are excessive grades or unusual soil conditions.

Subsoil conditions occasionally are a major problem. Some slums are located on good land where older dwellings of the well-to-do were abandoned. Frequently,

[76] There may be a question with respect to telephone and electric service as to whether the lines in the new development will be required (by the LPA or by the redeveloper's architect) to be run underground rather than on poles. Usually the utility company will not pay for underground wires, or, if it pays anything at all, only that part of the cost of underground service that it would have had to pay for overhead lines.

[77] Even if the LPA fully performs its obligations as to land preparation, the redeveloper will be misled if he figures usual "ditching cost." Working with the rubble and foundations which underlie a cleared area is more expensive than working with earth. See *Builders Tell How Bureaucracy Tangles Renewal*, House and Home, May 1960, pp. 70, 71.

however, unfavorable locations near swamps, over peat bogs, and the like became sites of shanty towns and squatter colonies that were later surrounded by the city and are now being torn down. Modern construction methods make these areas buildable today, but at an extra cost for foundations. Rather than have each bidder try to calculate the cost of subsoil conditions for himself or hope to trap an unwary bidder who assumes that the existence of previous construction (albeit shanties) evidences good subsoil conditions, the LPA should have borings made and engineering conclusions arrived at by a reputable soil specialist and should make all this data available to all bidders.[78]

III

SUBMISSION OF THE BID

A. Bidding Entity

The entity to submit the bid should be selected with care, since there will not only be legal and tax, but also public relations considerations. For example, even using a name with local connotations for the bidding corporation helps reduce undue municipal xenophobia.

All the detailed technical requirements of the LPA for the bid should be meticulously followed; if there is competition, the rival bidders will search out any technical defect about which to complain. If the bidder is a foreign corporation, it may be required to qualify to do business in the state before submitting its bid (either as an LPA requirement or as a matter of state law). A good many legal problems are simplified if the redeveloper organizes a separate domestic corporation to make each bid. In addition, if a "section 1244 plan" is adopted by the bidding corporation so that its stock will be treated as "small business" stock, the investment in making an unsuccessful bid can be treated as an ordinary loss instead of a capital loss.[79]

Whether disposal is by negotiation under open competitive conditions or purely by negotiation, the selection of a redeveloper will be made on the basis of sundry factors other than the price offered for the land. This means that the selection of the redeveloper will be, in large part, a subjective determination, and, as in the case of a personal injury suit tried to a jury, no one can predict what the result will be. Therefore, if the redeveloper is not a local resident, for some of the same reasons

[78] URBAN RENEWAL MANUAL § 14-2-2 authorizes expenditures for engineering investigation of subsoil conditions. The FHA may not recognize the full amount of special foundation costs in calculating the allowable mortgage, and such costs (like off-site utility costs), therefore, are of special concern to the redeveloper.

[79] See Groh, *What to do About Stock of the Small Business Corporation*, 37 TAXES 225 (1959). A "Small Business Corporation" under INT. REV. CODE OF 1954, § 1244 is to be distinguished from a "Small Business Corporation" under *id.* § 1371, which can elect to be taxed as a partnership, and also from a "Small Business Investment Company" organized under the Small Business Investment Act of 1958, 72 Stat. 689, 15 U.S.C. §§ 661-96 (1958), to provide equity capital to small business. One small business investment company has already been organized to provide the technical assistance and capital requirements to corporations formed to undertake redevelopment projects. See proposal of Western Urban Redevelopment Investment Corporation for the San Lorenzo Park project in Santa Cruz, California. See also *infra* notes 176-78.

that a party to an action retains local counsel, serious consideration should be given to joint venturing with a local contractor, developer, or investor. Conversely, if the redeveloper is a local resident, he may seek as a partner one of the redevelopers with a national reputation. In short, the redeveloper should employ every legitimate means to improve his public posture and his image in the eyes of those who are to make the selection. In addition, the redeveloper's staff should take into consideration the preferences of the members of the LPA, its staff, and its consultants in formulating the proposal. The redeveloper's architect may consider the request that he adapt his designs to LPA eccentricities as an insult to his personal integrity and original thinking, but, nevertheless, as in any competitive activity, there is no substitute for victory.

B. Approval of Proposal—Public Hearing

Under HHFA rules, the selection of a redeveloper by the LPA must be approved either (a) by the city council, or (b) by the LPA, without city council approval, but after an advertised public hearing has been held on the proposal to enter into a land disposition agreement with the particular redeveloper.[80] In some cities, both requirements may be imposed. HHFA concurrence will not be required if a minimum disposal price was concurred in by the HHFA prior to the public offering under one of the competitive methods.[81]

Many LPAs, however, will be bound by state and local provisions more restrictive than the federal requirements; and a public hearing and/or approval by the city council of any disposition of land may be necessary. The language of the state and local laws is often somewhat vague as to their requirements for a public hearing and/or approval by the city council; and so counsel for the redeveloper must rely on the LPA counsel, who will generally follow agency custom and the path of caution.[82]

IV

UNSUCCESSFUL AND SUCCESSFUL BIDDER

A. Unsuccessful Bidder

If the client is not elected as sponsor, a careful review should be made of the basis of the award. Because sponsor selection is governed by both federal and local law, with many formal bid documents and informal procedures, a disgruntled unsuccessful bidder can often find some minor procedural issue. In addition, there are often untested constitutional questions. A shotgun attack made on the legality of

[80] URBAN RENEWAL MANUAL § 14-4-1, at 5.

[81] URBAN RENEWAL MANUAL § 14-3-5. Under disposition methods providing open competitive conditions, including negotiated disposal, the LPA may accept (a) a bid of the governing body of the LPA, or (b) if the LPA is the municipality, a bid of the municipality if the governing body of the locality adopts a resolution authorizing the acceptance of the bid or proposal. URBAN RENEWAL MANUAL, § 14-3-3.

[82] See *supra* note 55; Note, *Urban Renewal: Problems of Eliminating and Preventing Urban Deterioration*, 72 HARV. L. REV. 504, 513 *et seq.* (1959). Hearings, even though not required, may be useful in attaining public acceptance. Goldston & Scheuer, *supra* note 30.

everything from the enabling legislation to the letter of award will, if made without real grounds, be poor public relations for the local redeveloper, whose fellow citizens will blame him for all project delay,[83] and even worse public relations for the national redeveloper, who will be regarded as a troublemaker in other cities. As a practical matter, courts are not likely to review the propriety of an award where the LPA carefully reserves the right to make the award on any of a number of financial, design, bid price, and other grounds;[84] but where sponsorship seems to have been awarded on dubious grounds, an attack may be justified and successful. In one instance, the award by an LPA has even been attacked in a suit brought by the Board of Selectmen (city council).[85]

B. Successful Bidder

If his client is selected as sponsor, counsel must promptly work out with the LPA, subject to federal agency approval, a land disposition agreement. An outline or model form of the agreement often will have been included with the bid documents,[86] and usually it will have been tailored from the Model Contract for Disposition of Land for Private Redevelopment, which was developed by an HHFA task force (chairmanned by Herman I. Orentlicher, Professor of Law, George Washington University) for guidance of both federal agencies and LPAs.[87] This document is, in general, a reasonably satisfactory model. It need not be followed in detail; the LPA may add, modify, or omit substantive provisions to adapt it to a particular disposal.[88]

One recurrent problem with land disposition agreements is that LPAs and the draftsmen of the Model Contract, in their anxiety to be sure that covenants will run with the land, try to make them enforceable by neighboring land owners, the LPA,

[83] The threat of such a suit will concern the agency because it may seriously delay the project by impairing the land title available to the successful sponsor. Asch v. Housing and Redevelopment Authority of City of St. Paul, Minn., 97 N.W.2d 656 (Minn. 1959), was filed to block a commercial redevelopment, but it also delayed a contiguous residential development for more than three years.

[84] The possible grounds of award are almost unlimited when planning and design factors are considered. See *St. Louis Ready to Approve Project Beside Saarinen's Arch; His Views Unrecorded*, Architectural Forum, June 1960, p. 5, for an instance where detraction from the aesthetic effect of a proposed new national monument is an important factor and the National Park Service has been concerned with the award.

[85] See Town of Brookline v. Hickey, Equity No. 69066, Norfolk County (Mass.) Super. Ct. (1959). See also *Brookline's Lost Opportunity*, Architectural Forum, June 1959, p. 9; *Tempest Brews Over Renewal Bidding Results in Brookline*, 16 J. HOUSING 207 (1959).

[86] In any event, the LPA will have submitted a draft of the proposed land disposition agreement to the regional HHFA office prior to soliciting bids. See URBAN RENEWAL MANUAL § 14-2-3, at 1.

[87] The Model Contract (officially known as "URA, Guide Form of Contract for Disposition of Land for Private Redevelopment, Sept. 1957") is reprinted with a few critical comments in HAAR, *op. cit. supra* note 8, at 559 *et seq.* It is also reproduced in 6 AM. JUR. LEGAL FORMS § 768, at 75 (Cum. Supp. 1959). Both HHFA and FHA have approved the model form as conforming to the requirements of title I. See also Brownfield, *The Disposition Problem in Urban Renewal*, in part I of this symposium, 25 LAW & CONTEMP. PROB. 732 (1960).

[88] Deviations from the Model Contract must be cleared by the LPA with the HHFA and, if residential redevelopment is involved, with the FHA. URBAN RENEWAL MANUAL § 14-2-3, at 3.

and even "the community."[89] The intended effect is to make all restrictions—*e.g.*, the redevelopment plan, building codes, and zoning ordinances—into covenants that run with the land. The best approach for the redeveloper's counsel is to try to keep the topics covered by such covenants within reasonable limits[90] and to make sure that someone has final authority to agree upon changes in the land disposition agreement, perhaps by a provision that the LPA can act for and bind all parties entitled to enforce the covenants.[91] This is particularly important because many LPAs find great satisfaction in immediate recordation of any and all documents that the filing official will accept, and this "overrecordation" of redevelopment plans, city council resolutions, disposition agreements, and lengthy deeds repeating provisions of the earlier documents results in land titles that sometimes defy simple statement.[92] There really is no reason in most states why anything more should be recorded than a generalized declaration of restrictions and a deed with appropriate covenants.[93]

If the city's Workable Program[94] is not sufficient to keep the redeveloped area from deteriorating again, the answer would seem to be improvement of the codes in the Workable Program rather than detailed continuing supervision of the redeveloped area by the LPA. In this connection, the land disposition agreement should expressly require the LPA to take, or have taken, whatever action is needed to conform zoning ordinances, building codes, and other municipal restrictions to the redeveloper's construction plans as approved by the LPA. The relationship of such municipal controls to the redevelopment plan usually is not clear.[95]

Occasionally, an LPA will insist on unreasonable covenants, despite the HHFA policy that "the disposal agreement must be drafted to safeguard the interests of the project without burdening a redeveloper with unnecessary risk or obligations that might impair the marketability or value of the land or the ability of a redeveloper to obtain financing."[96] Such unreasonable covenants may well be invalid as restraints on alienation or on marketability. Nevertheless, once recorded, they are troublesome until judicially extinguished because of the fine distinction drawn by many courts

[89] See Ascher, *Private Covenants in Urban Redevelopment*, in COLEMAN WOODBURY (ED.), URBAN REDEVELOPMENT: PROBLEMS AND PRACTICES 221 (1953). The possibly vulnerable position of a redevelopment agency as assignor of a right of re-entry has been noted in HAAR, *op. cit. supra* note 8, at 593 n.2.

[90] In one city, a planner with an abhorrence of "flashing neon signs" has insisted that a provision against them go in as a perpetual deed covenant.

[91] See HAAR, *op. cit. supra* note 8, at 564 nn. 21-22.

[92] In one city, the recordation of a series of conflicting master plans and redevelopment plans has resulted in hopelessly confused land restrictions that will probably require entirely new plans recorded as amendments to the original plans. See HAAR, *op. cit. supra* note 8, at 560 n. 10.

[93] See URBAN RENEWAL MANUAL § 14-2-3, at 1-2, which requires sufficient recordation to give constructive notice. See HAAR, *op. cit. supra* note 8, at 560 n.10.

[94] See URBAN RENEWAL MANUAL § 2-1. See also Rhyne, *The Workable Program—A Challenge for Community Improvement* in part I of this symposium, 25 LAW & CONTEMP. PROB. 685 (1960).

[95] See Goldston & Scheuer, *supra* note 30, at 262 *et seq.*; HAAR, *op. cit. supra* note 8, at 233-34 n.2.

[96] See URBAN RENEWAL MANUAL § 14-2-3, at 3.

between invalidity and unenforceability,[97] and because of the murky substantive rules on the validity of restraints and on changed circumstances as a grounds for extinguishment.[98]

Another drafting difficulty is the "antispeculation" provisions contained in most land disposition agreements and suggested by the Model Contract. In the construction of a large project, the land will usually be parcelized and title to each parcel will be taken by an entity affiliated with the redeveloper (a subsidiary, for example), but seldom will it be taken by the redeveloper in his own name. Appropriate provisions should be worked into the land disposition agreement to permit this. (A related difficulty is that the language of some antispeculation provisions may not permit sale at a profit by the redeveloper to a management-type cooperative corporation, independent from the redeveloper, under a contract made prior to completion of construction, as must be done under section 213 of the National Housing Act.)[99] Land intended for commercial and industrial redevelopment should not be subject to the same antispeculation provisions as land intended for residential projects. Commercial and industrial tenants often insist on direct ownership, sale and leaseback, or other financing arrangements inconsistent with title retention in the redeveloper through completion of construction. Such devices as a lease from the redeveloper with an option for the occupant to buy at completion have been used to meet the needs of commercial and industrial occupants, but the problem would be better handled by adequate flexibility in the land disposition agreement.

Antispeculation provisions also usually restrict the transfer of stock without the prior approval of the LPA. In order to facilitate estate planning by the redeveloper as well as arrangements between him and outside investors who may want equity as well as debt in the project, it is advisable to provide in the land disposition agreement for transfer of stock without LPA approval, so long as the redeveloper retains control of the corporation.

The LPA is required by statute to obligate the redeveloper ". . . to begin within a reasonable time any improvements on such property required by the urban renewal plan,"[100] and HHFA policy is to state times in the land disposition agreement that are short enough to avoid procrastination and holding the land for speculation, but not so short as to be impractical.[101] Bringing these generalities down to specifics is

[97] See Strong v. Shatto, 45 Cal. App. 29, 36-37, 187 Pac. 159, 162-63 (1919), *overruled by* Hess v. County Club Park, 213 Cal. 613, 2 P.2d 782 (1931); see also Marra v. Aetna Construction Company, 15 Cal.2d 375, 101 P.2d 490 (1940); *cf.* Shelley v. Kraemer, 334 U.S. 1 (1948).

[98] See Dumpor's Case, 4 Coke 119b, 76 Eng. Rep. 1110 (K.B. 1578); I JOHN WILLIAM SMITH, A SELECTION OF LEADING CASES ON VARIOUS BRANCHES OF THE LAW 32 (11th ed. by T. W. Chitty, J. H. Williams & Herbert Chitty, 1903); and CHARLES E. CLARK, REAL COVENANTS AND OTHER INTERESTS WHICH "RUN WITH LAND" (2d ed. 1947). Ascher queries whether a constitutionally unenforceable racial restriction in a deed makes title unmarketable. See Ascher, *supra* note 89, at 227-28 n. 8. See also HAAR, *op. cit. supra* note 8, at 635 n. 4.

[99] National Housing Act, § 213, 71 Stat. 297, 12 U.S.C. § 1715e (1958).

[100] National Housing Art of 1949, § 105(b)(ii), 63 Stat. 413, 42 U.S.C. § 1455 (1958). See HAAR, *op. cit. supra* note 8, at 563 n. 18.

[101] URBAN RENEWAL MANUAL § 14-2-3, at 3.

usually one of the more difficult parts of negotiations with the LPA. The LPA, faced by public pressures to see the job done, is likely to think in terms of how rapidly is physical construction possible; while the redeveloper thinks of phasing the physical construction to the likely rate of market absorption of new housing units, to the most economical rate of physical construction, to the most effective turnover of his funds, and so on. A frequently used realistic compromise for residential areas is to require fairly prompt application by the redeveloper for FHA mortgage insurance guarantees, but to permit construction to be timed by the local FHA in its phasing of the issuance of its commitments.

Current URA policy permits the redeveloper's performance to be secured by a corporate surety performance bond in an amount equal to five to ten per cent of the estimated fair value of the land, instead of by a cash deposit.[102] The redeveloper will want to use a bond,[103] and counsel should check during the drafting stage to make sure that the conditions of release will be satisfactory to the bonding company,[104] since the LPAs sometimes fail to appreciate the necessity of precisely stating the surety's obligations and attempt to insert provisions that corporate sureties will not bond. In many instances, LPAs overreach in specifying the consequences to the redeveloper of default, not realizing that such overreaching may create an unenforceable penalty instead of an enforceable liquidation of damages. It is not generally appreciated that a forfeiture provision may be held to be a penalty even if exacted by a government body,[105] agreed to willingly by the private party,[106] supported by cash deposit or surety bond,[107] and appropriate for many, but not all, events of default.[108] In several instances, agencies have refused to scale down the default forfeiture in proportion to the land purchased, even though a forfeiture directly proportioned to nonperformance is the surest way to establish the validity of the forfeiture as a liquidation of damages.[109]

In general, the performance bond provisions should excuse—and current URA policy is to approve the excuse of—the redeveloper if, despite diligent efforts, he is unable to obtain FHA mortgage insurance guaranties (and, sometimes, FNMA mortgage purchase commitments).[110] It is almost impossible to proceed with most

[102] *Ibid.*

[103] See pt. II(D), *supra.*

[104] The corporate surety must be listed in Circular 570 of the Treasury Department.

[105] Priebe Sons v. United States, 332 U.S. 407 (1947).

[106] *Ibid.*

[107] RESTATEMENT, CONTRACTS § 340 (1932); Fidelity & Deposit Co. v. Walker, 75 F.2d 115 (5th Cir. 1935).

[108] RESTATEMENT, CONTRACTS § 339, comment (i) e (1932). See generally 5 ARTHUR L. CORBIN ON CONTRACTS ch. 58 (1951); 3 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS ch. 28 (1936); RESTATEMENT, CONTRACTS § 339 (1932).

[109] See Dunbar, *Liquidated Damage Clause—When to Use and How to Draft,* 20 OHIO ST. L.J. 221 (1959).

[110] See URBAN RENEWAL MANUAL § 14-2-3, at 4, which states: "A disposal agreement may permit the redeveloper to terminate the agreement and recover his good-faith deposit if, after preparing satisfactory plans and making a diligent effort to obtain financing, he is not able to secure financing for the redevelopment on a basis that generally would be regarded as satisfactory by builders and real estate developers. For a residential redevelopment, satisfactory financing may be defined to mean an FHA commitment in the full amount permitted by law under Section 220 of the National Housing Act."

projects in the absence of such federal aid, and the LPA relieves the local FHA and the FNMA of public pressures to cooperate if it makes their noncooperation irrelevant to the redeveloper's duty to proceed. In several cities, redevelopers who agreed to unconditional performance bonds have, nevertheless, been excused when federal aid was not available on the original terms. The principal difficulty with unrealistic performance requirements is that the least experienced bidders are most likely to fail to appreciate the problems and, in a Gresham's law of bidder competition, force all the bidders to offer an unsound provision.[111]

A matter of great importance in the contract is the clear specification of redeveloper versus LPA responsibility for demolition and site preparation.[112] If the LPA is an agency independent of the municipality, it often will have entered a cooperation agreement with the city, spelling out responsibility for the cost of driveway curb cuts, land compaction, etc. Cooperation agreements may also exist with both publicly and privately owned utilities.[113] One tricky item is the responsibility for tree lawns. The FHA will regard tree lawn expenditures (including underground sprinklers) as "off-site" and, therefore, nonmortgageable; thus, the redeveloper is greatly interested in getting the city to prepare the tree lawns.[114] All these site preparation provisions should be carefully reviewed with the redeveloper's architects, and counsel should make sure that the construction contracts leave no gap between where the city stops site preparation and the contractor starts construction.[115] If several redevelopers are working in the same area, the various land disposition agreements should permit the city to coordinate grades, ditches, sidewalks, and the like, so that in neither design nor expenditure will there be lack of coordination and waste.[116] Counsel for the redevelopers might well initiate, to the extent feasible between competitors, an exchange of information as to common title problems, legal descriptions of contiguous properties, etc. In some instances, joint action by several redevelopers may be required to obtain appropriate zoning for any one of them.[117]

An important title problem is to provide for recordable certificates from the LPA

[111] *Cf.* Farber, *Development by Shoppers,* Architectural Forum, Feb. 1960, p. 172: ". . . responsible and successful developer-investors . . . avoid redevelopment work because they have had experiences where they did considerable preparatory work, only to find themselves bidding against impetuous amateurs. Amateurs can outbid the professionals."

[112] In examining the site-preparation provisions, the redeveloper's architect should check the FHA requirements as to fills and grading in FHA's *Minimum Property Standards Manual.* A particular problem is the depth below the subgrade of paved areas and below finish grade of lawn areas to which the tops of existing foundations must be demolished.

[113] See II(E), *supra.*

[114] See note 75 *supra.*

[115] Subsoil conditions are an important consideration. LPAs cannot build extra foundations, but some disposition contracts provide for a price adjustment if borings disclose abnormally poor subsoil conditions. See note 78 *supra.*

[116] In one city, one redeveloper's grading poured the rain water into the contiguous parking lot of another redeveloper, and paths of the two projects completely failed to meet along the common boundary of the projects. It is difficult for two bidders to adjust from the competition for the award promptly enough to coordinate planning unless the LPA takes an active role.

[117] See Goldston & Scheur, *supra* note 30, at 256.

evidencing with finality compliance by the redeveloper with all conditions that might result in reverter or title default.[118] Each parcel owned by a separate entity should stand on its own feet for default and completion purposes, since it will be almost impossible to sell or refinance individual parcels interlinked by default provisions with other parcels. In any event, the FHA will almost always insist on this where its mortgage guarantees are involved. The various progress reports to the LPA should be terminated upon issuance of the completion certificates, as should most of the LPA's visitatorial rights. There is a tendency of some LPAs to seek a right of permanent overseeing that violates the theory that, after completion, the project should be treated like any other privately owned real estate. A related problem is that some LPAs try to make the project subject to all future amendments of the redevelopment plan, whether or not agreed to by the owner.[119]

In a few instances, LPAs may try to shift responsibility for policing the land to the redeveloper prior to conveyance, even though this creates problems for the redeveloper with which the LPA is far better equipped to cope. Also, the redeveloper should not be required to pay for and take title to the land until he is ready to use it. Since the LPA is more interested in construction than in penalties, it should hesitate to convey the land until it is sure the redeveloper is fully ready to proceed. In the event of default, no reverter clause will immediately give as good title (and thereby ability to select promptly a new redeveloper) as the LPA will have if it retains the title.

The contract should give the redeveloper freedom in selecting entities (corporations, partnerships, trusts, or individuals) to redevelop particular parcels so long as the redeveloper remains liable for full performance. The complex financial and tax considerations involved in obtaining equity funds for real estate development[120] should be recognized by giving the redeveloper full freedom to make equity investment in the project as attractive as possible. Since the URA will permit leasing as a method of disposition, the contract also should contain provisions permitting this.[121] Sometimes leasing, even with an option to purchase, creates financing difficulties, and counsel should be sure the leasing provisions meet FHA requirements for leasehold mortgage guarantees.[122]

Occasionally, LPAs try to insert rent limitation clauses and other inappropriate, short-lived, provisions in the land disposition agreement. The FHA rules on rent

[118] Provision is made for this in the Model Contract. See para. 4.

[119] See HAAR, *op. cit. supra* note 8. See also § 5(A), p. 17, of Santa Cruz proposed form of Land Disposition Agreement, San Lorenzo Park Development Project, Santa Cruz, California.

[120] See Berger, *Real Estate Syndication: Property, Promotion, and the Need for Protection*, 69 YALE L. J. 725 (1960).

[121] See Comment, *Long Term Leasing in Urban Renewal: An Alternative Method of Municipal Land Disposition*, 68 YALE L. J. 1424 (1959. See also Brownfield and Rosen, *Leasing in the Disposition of Urban Renewal Land*, *supra* p. 37; in some instances, state law may prevent or limit the use of leasing in disposition.

[122] *Id.* at 1432, 1450, 1452. One recurrent problem has been how the early call premium of LPA bonds (issued to finance the leasehold) is to be paid if the mortgagor-lessee (or mortgagee after default) exercises an option to purchase the land.

will be sufficient control so long as there is an FHA-guaranteed mortgage outstanding. The FHA rent ceilings are flexible, since they are based upon actual construction and operating costs. Fixed dollar rentals, such as are occasionally inserted in redevelopment plans or are proposed for land disposition agreements, are too rigid. Since the agreement will be recorded and difficult to amend, all irrelevant and immaterial items should be resisted.

When the LPA and redeveloper have finally agreed on the form of land disposition contract, it will be submitted by the LPA for review and approval by the URA, which, in turn, will arrange for FHA review and approval.[123] The redeveloper should make certain that the form of land disposition agreement has been reviewed by the attorneys of the FHA and the FNMA offices having jurisdiction over the project and that they are satisfied with it. This is important because once recorded it will appear in the title that these attorneys will review, and they may raise more detailed questions on title that were not considered by the HHFA, whose review will have concentrated on whether the document conforms to HHFA land disposal policies and protects the federal financial interest in the project.[124]

V

PREPARING FOR COMMENCEMENT OF CONSTRUCTION

Following the award and prior to commencing construction, the redeveloper must reanalyze his earlier determination of the economic feasibility of the project by obtaining final construction and operating costs figures from an advisory triumvirate consisting of his accountant, his architect, and, if he himself is not a builder, from his general contractor. The accountant, who is normally in the full-time employ of the redeveloper, must schedule (on FHA forms, if FHA financing is to be used) the accumulating cost data that the architect and general contractor produce as plans and specifications are finalized and subtrade bids are firmed up. During this period, the lawyer will supply information on real estate taxes pertaining to the project, will determine the applicable sale and use taxes on the construction, and will work out the final form of the contractual relationships between the redeveloper and the architect and general contractor that may to advantage have already been covered in general terms. Even if the redeveloper is a builder, the lawyer will have to work out, for FHA purposes, the relationship between the redeveloper *qua* redeveloper and the redeveloper *qua* general contractor.

A. The Architect

The redeveloper, prior to the award, normally has employed or used an architect. In fact, in urban renewal projects, unlike many other construction projects, he has

[123] See URBAN RENEWAL MANUAL § 14-2-3, at 2. This review will not be limited to form, but may question the reasonableness of any concessions the LPA may have traded out with the redeveloper and will pick up such small points as agreement by the LPA to pay for the federal tax stamps on the deed consistent with municipal policy rather than putting this small ($1.10 of tax per $1,000.00 of purchase price) cost on the redeveloper as required by the URBAN RENEWAL MANUAL § 14-2-3, at 4.

[124] See URBAN RENEWAL MANUAL § 14-2-3, at 3.

probably employed several architects. He will have required a local architect for some of the same reasons he required a local lawyer—not only his knowledge of the locality's building and fire codes, but also his knowledge and acquaintance with local officials. It is in the administration of building and fire codes and other local regulations covering construction that law in action differs from law in theory. In addition, the redeveloper may have hired an architectural firm experienced in city-planning, because in a huge project, considerations of such planning are more important than simple site-planning. Finally, because of the low percentage of ground coverage permitted by most redevelopment plans (frequently twenty-five per cent coverage or less), the significance of a landscape architect becomes much more important. Exedra, gates, lawn furniture, playgrounds, and other forms of so-called "street furniture" must be designed to break up the monotony and make use of the large, open areas.[125] It is likely that all these architectural services prior to award will have been performed on the basis of oral or informal letter agreements, and not on the same fee basis as will be worked out in the event the redeveloper receives the award. It is unlikely that the redeveloper will want to go to the trouble and expense of working up detailed architectural contracts prior to the project award.

If conventional financing is to be used, the contract with the architect negotiated subsequent to the award will probably be embodied in agreements substantially in the standard A.I.A. form.[126] If FHA-insured financing is used, the arrangements with the architect will have to comply with FHA requirements. The first FHA question is whether the architect is "dependent" or "independent" according to FHA regulations, since the FHA classification affects the amount of the fee allowable by the FHA for architectural services and the times and percentages of payment. The principal difference is that the architect who is not "independent" may not, under applicable FHA regulations, continue to act in that capacity once construction has begun.[127]

Since the FHA requires that each mortgage parcel be independent of all other mortgage parcels in contractual obligations and also prescribes a form of architectural contract that assumes a single architect, the redeveloper will find that it simplifies his FHA processing if his bidding corporation makes an over-all contract with a single architect in which that architect agrees to make separate agreements with each mortgagor and further agrees to assume payment to other architects and engineers employed by the redeveloper. The contracting architect, of course, will expect the redeveloper to make such arrangements as will assure him that he will "net-out" his agreed fee.[128] The FHA has a schedule of allowable architectural fees that de-

[125] See *Redevelopment Progress Reported from Here, There, Everywhere*, 15 J. HOUSING 94 (1958). Redevelopment plans in nine cities include "street furniture" and other touches. See Halprin, ***Landscapes Between Walls***, Architectural Forum, Nov. 1959, p. 148.

[126] See AIA, STANDARD CONTRACT FORMS AND THE LAW (1954).

[127] See *infra* p. 163.

[128] FHA forms of mortgagor-architect contracts provide that "all other agreements between the parties" are void (see para. 2 of FHA forms); but this should not affect the over-all contract between the redeveloper and the contracting architect, since the redeveloper is not "a party" to the FHA form of contract.

creases as the total cost of the project increases. One problem here is whether or not the total cost of the mortgage parcels will be lumped together for purposes of determining the allowable fee or whether each parcel will be treated independently. Payment to the architect under his employment contract should, if possible, be made in installments tied to the FHA architectural reimbursement schedule.[129] Since architects, however, have not taught their families to require food and clothing coincidental with FHA time schedules, it may be necessary for the redeveloper to agree upon a different and earlier schedule of fee payments, reimbursing himself for such advance payments from the mortgage proceeds when the same are eventually received.

Counsel for the redeveloper should impress upon the architect the essentiality of checking and rechecking his plans and specifications against the numerous requirements that must be complied with—the redevelopment plan, declaration of restrictions, and land disposition contract that relate to the particular project, as well as the general municipal restrictions, such as the building, zoning, and fire codes. It is also of utmost importance that the architect be familiar with the FHA's minimum property standards, particularly the room-count criteria for multifamily projects (three or more living units), since there is a per room or per unit mortgage insurance limit, as well as a mortgage insurance limit based on percentage of replacement cost.[130] The economic feasibility of the project will depend in large measure on the redeveloper's ability to build with respect to each mortgage parcel for no more than the FHA's estimate of replacement cost and to obtain a loan equal to the maximum percentage of replacement cost—*i.e.*, ninety per cent.[131] It may also depend on the redeveloper's ability to build each mortgage parcel within the FNMA per unit limitations if he intends to use the FNMA for permanent financing. Unless the architect is careful, the FHA's room-count limitations may produce a mortgage less than said percentage. In many instances, the room count can be increased by the simple and inexpensive devices of putting a partition between the living room and dining area of a unit, or providing a balcony or patio.[132] In short, the architect's function

[129] See *infra* note 194.

[130] See FHA, MINIMUM PROPERTY REQUIREMENTS FOR PROPERTIES OF THREE OR MORE LIVING UNITS (rev. ed. 1942).

[131] 24 C.F.R. § 263.6 (1959) specifies that § 220 commitments may not insure mortgages in excess of $2,500 per room (or $9,000 per unit if the number of rooms in the project does not equal or exceed four per unit). If elevator-type structures are to be built, the per room figure is increased to $3,000 and the unit figure, in the event the number of rooms in the project does not equal or exceed four per unit, is increased to $9,400. In areas for which the Commissioner finds construction cost levels so require, the per room allowance, without regard to the number of rooms per family, may be increased by $1,250. The maximum insurable mortgage amount, over-all, is $12,500,000. 24 C.F.R. § 263.7 (1959) imposes a second limitation—the mortgage to be insured shall not exceed 90% of the Commissioner's estimated replacement cost of the project. Replacement cost valuation precludes the FHA from taking into consideration, when valuing the proposed project, the character of the surrounding neighborhood and other factors that in a redevelopment area would normally depress the market price between a willing seller and purchaser.

[132] It has been suggested that the FHA room count regulations are a primary determinant in the architectural planning of apartment houses. See Miller, *The Rise in Apartments*, Architectural Forum, Sept. 1958, pp. 105, 106-07. In August 1960, the regulations were changed to reduce the room count for

in an FHA-insured project is to design and redesign the project with frequent consultations with the FHA, to the end that the redeveloper's cost of the project and the FHA's estimate coincide and the statutory maximum mortgage is obtained.

B. General Contractor

If the redeveloper does not act as his own general contractor and has no other relationship with his general contractor except the employment of him to construct the project, the prime construction contract will differ from the customary general contract of the building trade in four principal ways. First, it will be carefully intermeshed with the land disposition contract, so that there will be no gaps between what the LPA must do to prepare the site and what the general contractor must do in his construction.[133] (It may very well be that both the LPA and the redeveloper can save considerable money by using the same contractor or contractors, engineers, and architects on land preparation work, or at least make arrangements for their work to be coordinated from the outset.) Second, the payments to the contractor and certifications required from him must be tailored to FHA requirements, if FHA financing procedures are to be used. Third, partly because it is within the control of the general contractor to foresee and avoid certain risks and partly because the redeveloper desires to be assured that the general contractor has double-checked his plans and specifications, the redeveloper will want the general contractor to assume the responsibility for increased costs attributable to subsoil conditions, architectural mistakes, and, if federal financing is anticipated, FHA change orders required by the FHA once construction has begun.[134] Fourth, as was true of redeveloper's arrangements with the architect, his arrangements with the general contractor should, if FHA insurance is to be used, provide that the general contractor will execute separate construction contracts with each mortgagor.[135]

If the redeveloper does act as his own general contractor or has certain relationships with his general contractor, the FHA may determine that an "identity of interest" exists between them. In many instances, such a determination may be beneficial to the redeveloper. The National Housing Act provides that the FHA replacement cost estimate of the mortgage unit shall include an allowance for a builder's and sponsor's profit, and risk fee of ten per cent of all includable costs

balconies from ½ a room to ¼ a room. In many cases, FHA officials felt, balconies had been added to some projects only because they raised the allowable mortgage ceiling by more than their actual cost. See *New FHA Room Count Rules Give Major Boost to Apartment Building Mortgage Limits*, Architectural Forum, Sept. 1960, p. 5.

[133] See *supra* p. 145.

[134] The A.I.A. Standard Form of General Conditions, used by the FHA and incorporated in the FHA form of contract and customarily followed in the building industry, places the risk of subsoil conditions on the redeveloper. See A.I.A., GENERAL CONDITIONS OF THE CONTRACT FOR THE CONSTRUCTION OF BUILDINGS form A2, art. XV (Sept. 1951).

[135] If the redeveloper is in a position to procure air-conditioners, medicine chests, etc., at a lower price than the local general contractor (perhaps, because, he is a national redeveloper with numerous projects under construction using such items), he may wish to reserve the right in these construction contracts to supply such items against appropriate credits. If the A.I.A. Standard Form of General Conditions is used, this will require a revision of art. IX of said General Conditions.

except land, unless the FHA Commissioner certifies that such an allowance is unreasonable.[136] However, this is limited by FHA regulations that provide that where there is no "identity of interest" between the mortgagor and general contractor, there shall be included in the replacement cost estimate an allowance for builder's and sponsor's profit risk fee equal to ten per cent of all items entering into the term "actual cost" *except* amounts paid by the mortgagor to the general contractor under the construction contract and for the cost of land.[137] Lack of "identity of interest" may have the effect of reducing the mortgage and could increase the redeveloper's cash equity requirements.[138] It is the responsibility of the director of the local FHA insuring office to determine from the information provided if any such "identity of interest" exists. It has been determined that an "identity of interest" does exist if the redeveloper or mortgagor is a member of a joint venture with the general contractor or owns stock of the general contractor.

Once the contract with the general contractor has been executed and subtrade bids obtained, a payment and performance bond[139] for each mortgage parcel, in form satisfactory to the mortgagee, redeveloper, and the URA, must be obtained by the general contractor. If FHA financing procedures are to be utilized, the bond must follow the form of the FHA "dual obligee" and and must name the mortgagor, mortgagee, FHA, and LPA as obligees.[140] The cost of the bond is a mortgageable cost item for FHA purposes.

Occasionally, a supplemental arrangement with the general contractor may be required to cover work done on the project site prior to the recordation of the construction loan mortgage. Either public relations or weather considerations may require this. Sometimes the mayor or the LPA, faced with public predictions of a

[136] National Housing Act of 1949, § 220(d)(3)(B)(ii), as amended, 68 Stat. 596 (1954), 12 U.S.C. § 1715k(d)(3)(B)(ii) (1958).

[137] 24 C.F.R. § 263 9c(b) (1959).

[138] National Housing Act of 1949, § 220(d)(3)(B)(ii), as amended, 68 Stat. 596 (1954), 12 U.S.C. § 1715k(d)(3)(B)(ii) (1958), provides for an allowance for builder's and sponsor's profit and risk of 10% of all items except land. However, the FHA regulations arbitrarily exclude amounts paid to a general contractor where there is no identity of interest. Congress, in writing the 10% builder's and sponsor's profit and risk provision, recognized that urban renewal involved risks greater than those normally encountered by builders and sponsors and, therefore, allowed a greater profit margin than in the case of normal multifamily development. It would seem logical that where a redeveloper assumes all of the risks (including the risk of future profitable operation and excluding only risks related to actual construction) and enters a contract with a general contractor whereunder the latter has no more risk than in the case of any construction project and, therefore, agrees to a fee of less than 10%, the redeveloper is entitled to 10% on all items, exclusive only of land. The override on the construction contract should not be considered as an extra profit on actual construction, but as part of an allowance for profit and risk with respect to the entire project.

[139] See Cushman, *Surety Bonds on Public and Private Construction Projects*, 46 A.B.A.J. 649 (1960), for a discussion of various types of construction bonds. The FHA requires a payment and performance bond rather than simply a payment bond that does not compel the surety to complete the job. A performance or completion bond may require the surety to become a general contractor and to finish the job.

[140] FHA Form No. 2452; see also requirements of the HHFA as set forth in the URBAN RENEWAL MANUAL § 14-2-3. Upon the furnishing to the LPA of the dual-obligee bond, the redeveloper may have released part of his good faith deposit under the land disposition agreement. URBAN RENEWAL MANUAL § 14-2-3, at 4. See *supra* note 104 for the requirement that the bond be written by a surety listed in Circular 570 of the Treasury Department.

groundbreaking date or with a primary or general election date, may insist that visible work be done on the site. On the other hand, the rainy season may be approaching and unless the earth compacting work is completed immediately, commencement of construction of the project may be delayed several months; if compaction can be done immediately, then the foundations can go in and work can proceed regardless of the vagaries of weather. Commencement of work prior to mortgage recordation, however, creates several legal problems. If FHA-insured financing is involved, it is essential that permission to move ahead in advance of closing be obtained from the FHA; otherwise, the cost of the work done in advance of mortgage recordation may not be included under the mortgage, and the redeveloper will be forced to pay all of the bill in cash. Furthermore, at the closing, the FHA or the conventional mortgagee will insist on assurances that the mortgage is a first and paramount lien on the real property. If mechanics' lien periods have not run, waivers will have to be obtained, and in any event, the title company will have to insure against any and all possible superior liens. Another way to skin this particular cat would be to get the LPA to do the compaction and then consider this earth work as adding to the value of the land and persuade the mortgagee (and the FHA) to value the site to include the cost of the work. This would bring it under the mortgage, and the end result would be the same.

C. Federal Agencies

As soon as the redeveloper has drawings sufficiently advanced and costs sufficiently accurate that it will be possible for the local FHA to consider intelligently the facilities he will provide for the rents he will be charging, the redeveloper should attempt to obtain a "letter of feasibility" from the local FHA office. There is no point in proceeding to develop working drawings if the FHA office will not accept the necessary rents as attainable, and the redeveloper should at the earliest possible point come to grips with this problem. At the same time, it will become clear whether or not it will be necessary to request the FHA to increase the per room or per unit statutory dollar limits of the maximum insurable mortgage. Concurrently, the redeveloper will want to make a final check on whether his project qualifies for the FNMA's "special assistance" fund.[141]

Before submitting his application for an FHA commitment for mortgage insurance, the redeveloper will want to ascertain the amount of the statutory maximum insurable mortgage and will, if necessary, attempt to persuade the FHA to find that local cost levels require an increase in the per room or per unit mortgage ceilings.[142] The test to determine if the cost level in an area requires an increase in the statutory limit is allegedly relatively simple: "Is the local cost level for material, labor, and

[141] National Housing Act of 1949, § 305(b), as amended, 72 Stat. 73, 12 U.S.C. § 1720(b) (1958). See also Note, *Urban Renewal: Problems of Eliminating and Preventing Urban Deterioration*, 72 HARV. L. REV. 504, 535 (1959); *infra* p. 153.

[142] For per room increases in insurable mortgages because of "high cost" determinations, see *supra* note 131.

land such that a segment of the typical rental market is denied benefits of the National Housing Act due to statutory limits?" If so, then an increase is in order up to $1,250. per room.[143] This, of course, is easier said than done, and the Washington FHA must approve the local FHA office's recommendations. (Washington is currently studying the possibility of the local insuring office making such a determination within certain prescribed limits.) Because the FHA believes that such findings relax the pressure to keep building costs and hence rentals down, it is not happy about granting increases in mortgage ceilings. Increases in land, buildings, and financing costs, however, are making increases in mortgage ceilings more and more necessary if urban redevelopment is to proceed. This is particularly true in the case of high-rise buildings.

The next step for the redeveloper is to explore the availability of FNMA permanent financing. The construction money mortgagee will most likely have agreed to lend funds only if the redeveloper can procure a FNMA commitment or a conventional "take-out" to buy the mortgage at completion of the period allowed for construction and rent-up. The reason for this is that the market for FHA 5¼ per cent, forty-year project mortgages is not what one would call a seller's market. As of this writing, a private lender is not likely to pay more than ninety-three per cent, which means that a mortgage note in the face amount of $1,000,000 will only net the mortgagor $930,000. Such a $70,000 nonmortgageable discount would take both the profit and the romance out of urban redevelopment. To keep some profit and romance in the program, Congress has authorized the FNMA to buy FHA-insured mortgages out of its so-called "special assistance" funds, without regard to market.[144]

At this writing, the FNMA is buying such mortgages at a one per cent discount to net ninety-nine per cent, and also charging both a purchase commitment fee of one per cent and a purchase fee of ½ per cent, which, therefore, nets the mortgagor 97½ per cent of the face amount of the mortgage note. The purchase commitment fee of one per cent of mortgage amount must be paid to the FNMA for the commitment to purchase, which means the redeveloper must pay out that much in cash in advance of the FHA closing. In addition, the mortgagee may require the mortgagor to escrow 1½ per cent of the mortgage amount or furnish collateral, so that the mortgagee will be certain to be reimbursed for the FNMA discount of one per cent and purchase fee of ½ per cent when it tenders the mortgage for sale to the FNMA.[145] In such event, however, the mortgagee may be willing to invest

[143] See Mason, *Local Cost Levels Guide FHA Mortgage Limits*, J. Home Building, Aug. 1958, p. 61; Miller, *supra* note 132.

[144] See National Housing Act of 1949, § 305, as amended, 72 Stat. 73, 12 U.S.C. § 1720 (1958), which provides that the President may authorize the FNMA to make commitments to purchase, and to purchase, mortgages covering urban redevelopment housing constructed or rehabilitated under §§ 220 and 221. There is a ceiling on the total amount of commitments and purchases that Congress has, from time to time, increased to accommodate the §§ 220 and 221 programs.

[145] The redeveloper's attorney, in drawing up the loan agreement with the mortgagee, should preserve the right in the mortgagor to designate a purchaser other than the FNMA to cover the situation where

such funds and pay the mortgagor the interest thereon.

The redeveloper will next fill out and submit to the local FHA office his application for mortgage insurance.[146] The application[147] requires the redeveloper to set forth his estimated replacement cost of the project, his request for mortgage insurance in a specified amount, his anticipated rental income, and his operating expenses (including real estate taxes) and debt service requirements. An FHA application fee of $1.50 per $1,000 of requested mortgage amount is paid by the redeveloper, and the architect's application drawings[148] are submitted. Thereupon, the underwriting section of the local FHA begins its analysis of the application and application drawings to ascertain whether or not it shares the optimism of the redeveloper.

VI

FHA AND FNMA AIDS TO URBAN REDEVELOPMENT

We have commented already on some aspects of the special financing incentives available to redevelopers under the current FHA and FNMA programs. Even with these incentives, it has been difficult to attract qualified redevelopers to many projects; absent such incentives only the few most attractive sites could be redeveloped.[149]

The liberal mortgage insurance issued by the FHA under section 220 of the National Housing Act[150] (which is available only for projects in redevelopment areas certified as such by the HHFA), unlike other FHA programs, uses a replacement-cost, rather than a fair market, valuation in calculating the maximum insurable mortgage. Replacement-cost valuation precludes the FHA from taking into consideration, when valuing a proposed project, the character of the surrounding neighborhood and other factors that in a redevelopment area would normally depress the

during the construction period, interest rates fall. For example, if after the 1% purchase commitment fee has been paid, the mortgage can be sold elsewhere to net better than 98½% (FNMA 1% discount and ½% purchase fee), the mortgagor should have that election with the benefits accruing to him rather than the mortgagee.

[146] Since there is almost always a shortage of funds for construction financing, the redeveloper should ascertain the amount of money available on a rotating basis for construction and then divide his project into mortgage parcels of sizes that will not require mortgages in excess of the construction funds.

[147] FHA Form No. 2013. It has aptly been said that ". . . reading this form and the explanatory notes is an education. . . ." Pollack, *Urban Renewal in New York City and The Investor*, 14 RECORD OF N.Y.C.B.A. 515, 519 (1959).

[148] Application drawings comprise plans and specifications without the detailed drawings of the mechanical subtrades. The required application drawings are described in FHA, MINIMUM PROPERTY REQUIREMENTS FOR PROPERTIES OF THREE OR MORE LIVING UNITS app. D, at D-3 *et seq.* (rev. ed. 1948).

[149] This article will limit its FHA discussion almost exclusively to urban redevelopment projects under § 220, which is confined to urban renewal project areas. There are, however, a number of FHA programs for both new construction and rehabilitation that can be used by a redeveloper. Section 213 covers various types of cooperative housing; § 221 covers relocation housing, inside as well as outside of the urban renewal area; § 231 covers housing for the elderly (§ 202 provides for direct federal loans for construction of elderly housing but has not, as of yet, been implemented); and § 232 covers nursing homes. The procedures under these sections are, in many ways, similar to § 220 procedures, but each has its own particular problems.

[150] 72 Stat. 73, 12 U.S.C. § 1715k (1958).

market price between a willing seller and purchaser. Similarly, the FNMA, under the "special assistance" provisions, is precluded from making a money market valuation of mortgages on redevelopment projects. It is compelled to provide long-term financing when, because of the low interest rates permitted by the FHA on insured mortgages, conventional lenders are unwilling to provide financing.

It is to be expected, as in any private business receiving assistance from, and to a degree, regulated by the federal government, that there will be some conflict of objectives between the Government and the redeveloper, particularly the redeveloper interested in a quick profit rather than in long-term real estate values. The FHA desires to minimize its liability as insurer of the mortgage and to promote well-designed, adequately maintained, and rentable projects. The FNMA does not wish to purchase mortgages where there is a probability of a default or of a moratorium on principal payments. Although Congress has instructed both the FHA and the FNMA to ignore their usual precautions for redevelopment financing, it has proved difficult for the staff of either agency to appraise redevelopment projects differently than the other real estate mortgages that they process.[151] To achieve their objectives, the FHA and the FNMA have been granted regulatory powers by the National Housing Act over the activities of section 220 mortgagors[152] and have exercised extensive administrative discretion in interpreting and applying their regulatory powers. Much of such discretion has, in turn, been delegated down to the level of the local FHA and FNMA offices. Consequently, a redeveloper with projects in more than one locality may be astonished to discover what appear to him to be arbitrary differences in procedure between different local offices. Since the distribution of copies of many of the FHA and FNMA policy directives are administratively "restricted" and not available for examination by the redeveloper except when arguing a particular problem with the local office, early and frequent consultation with the officials is essential.

A. Prior to Commencement of Construction

1. *Analysis of FHA commitment to insure*

Although the FHA is willing to insure the mortgage upon completion of the project,[153] the lender of the construction money will usually require FHA insurance for its advances of mortgage proceeds during the course of construction. Since the FNMA purchase of the mortgage will be conditioned on the mortgage being insured by the FHA, the construction lender will want to be sure the FHA is satisfied with the physical construction work as it progresses. The construction lender will also want to be insured against the risk of having his money tied up in a project that, for any reason, is not completed. Our discussion will, therefore, be addressed only to the

[151] Indeed, the FHA Washington office will shortly institute the practice of staffing local FHA offices with one individual trained in § 220 procedures and policies. See House and Home, May 1960, p. 71.

[152] As to FHA's power to control rents, sales prices, capital structure of mortgagor, etc., see 24 C.F.R. §§ 263.9(a)(1) and 263.9(a)(2) (1954), as amended.

[153] 72 Stat. 73, 12 U.S.C. § 1715k(b) (1958).

"Commitment for Insurance"[154] rather than the "Commitment to Insure Upon Completion." The FHA Commitment for Insurance is a notification to the proposed mortgagee that the FHA is prepared to insure advances up to a specified amount made for construction of the project by the mortgagee, which amount may be the amount requested by the mortgagee or a lesser amount.

A Commitment for Insurance of a mortgage may be issued in a lesser principal amount than requested if the local FHA office uses as its "Estimated Available Market Price of Site" an amount less than the LPA's selling price[155] or if the FHA uses as its "Estimated Replacement Cost" an amount less than the redeveloper's estimate.[156] The local FHA office may also reduce the amount of the mortgage requested by the redeveloper if it deems the proposed rentals for the project to be too high for the market.[157]

An FHA reduction in the amount of the redeveloper's requested insurable mortgage will largely represent to the redeveloper an additional and heretofore unexpected equity investment. At this point, the redeveloper may determine that the possible return on the additional equity investment makes the project unfeasible, and, therefore, he may decide not to go forward with the construction of the project. If his contractual arrangement with the LPA contains a so-called "diligent efforts" clause, which releases him from liability if he is unable to obtain an FHA Commitment for Insurance in the maximum legal amount, he will be able to recover his "good faith" deposit[158] but will, of course, have to write off his planning

[154] The FHA is permitted to issue its Commitment for Insurance in advance of the actual lending of money by the construction mortgage mortgagee. Sec. 220(b) as amended, 24 C.F.R. § 232.2(b) (1954). Such Commitments are effective for a period not to exceed 180 days. 24 C.F.R. § 263.4(a) (1957).

[155] This is one reason why the LPA in its land disposition should not seek a price so high that normal FHA § 220 financing becomes impractical.

[156] Some of the FHA's estimating procedures based on cubage, etc. may produce results lower than the subtrade bids the redeveloper has been able to obtain. The redeveloper, his architect, and his attorney should keep in close touch with the FHA office during its processing in order to be alerted to, and try to solve, such problems as early as possible.

[157] The Commitment for Insurance includes a detailed estimate of the replacement cost of the project as figured by the local FHA office and a Project Income Analysis as calculated by the local office. Estimated replacement cost includes, pursuant to 24 C.F.R. § 263.7(b) (1956), in the case of new construction, the cost of land, proposed physical improvements, on-site utilities, architect's fees, taxes, interest during construction, and other miscellaneous charges approved by the Commissioner, including an allowance for builder's and sponsor's profit and risk determined by applying a percentage against the estimated replacement cost excluding land. The Project Income Analysis estimates the reasonable income the redeveloper can anticipate from the project property. It necessarily involves a determination by the FHA of what rents are marketable in the area. From the gross rental derived, there is deducted a 7% vacancy allowance and estimated operating and maintenance charges of the project (these estimates may be higher or lower than estimated by the redeveloper on his application for mortgage insurance). The total debt service (amortization of mortgage principal requested and interest thereon) is then compared to the net income (after deduction of real estate taxes, insurance, FHA replacement reserves, and all other cash operating expenses) to be produced by the project. If the ratio of debt-service to such income is too high (above 90% under present FHA policies), the project income must be increased by increasing rents (it is most unlikely that the FHA will permit this) or the principal amount of the mortgage to be insured will be reduced to an amount less than requested. Furthermore, if the FHA increases the redeveloper's estimate of operating expenses, it may, because of the resultant reduction in project income, issue a Commitment to insure a mortgage in a lesser amount.

[158] See discussion of availability of such provisions in land disposition documents, *supra*, pp. 144-45. The "diligent efforts" clause is authorized by URA in URBAN RENEWAL MANUAL § 14-2-3, at 4.

and organizational expenditures to date, which may be quite substantial. In the absence of a "diligent efforts" provision, it may be necessary for the redeveloper to forfeit his "good faith" deposit in order to avoid an even larger loss by the investment of equity money upon which the available FHA Commitment for Insurance would allow substantially no return.[159]

The "Estimated Requirements for Completion of the Project," however, usually exceed the actual out-of-pocket cash needed by the redeveloper in the FHA Commitment for Insurance to complete the project. The FHA rules and regulations provide for a profit-and-risk fee that is included in the estimated replacement cost calculations for purposes of figuring the maximum insurable mortgage.[160] This fee may be waived, in part or in total, to reduce cash requirements at initial closing.[161] The architect's fee, if paid other than in cash, may be used, to the extent payment is in such other medium, to further reduce cash requirements at closing.[162]

2. *Determination of the mortgagor entity*

Since ". . . no housing investor can afford to omit the 'tax angle' from his analysis of the merits of a contemplated investment . . . ,"[163] tax considerations will play an important role in the selection of the legal form of the mortgagor entity. Real estate investment is currently very attractive taxwise because of liberalized depreciation rules. These ". . . tend to encourage new rental investment by substantially increasing the potential cash take-out during the first few years and by providing a tax offset to the investor with other corporate holdings."[164] Unless investment in section 220 projects can provide at least some of the tax benefits that currently make other real estate investments attractive, it will be extremely difficult to interest investors in redevelopment projects.

Under section 167(b)(2) of the Internal Revenue Code of 1954, an owner of real property improvements held for the production of income may depreciate the improvements on a declining-balance method using a rate twice as great as would normally be permitted if so-called "straight-line" depreciation were utilized.[165]

[159] Since the LPA is interested in getting the redevelopment built rather than windfalls from "good faith" deposit forfeitures, it should be careful in its land disposition that it does not select, largely because of a high land price offer, an inexperienced redeveloper likely to get himself into this situation.

[160] 24 C.F.R. §§ 263.9c(a) and (b) (1956), and 241.35(a) and (b) (1959) note that under § 213, if no "identity of interest" exists, there is no sponsor's profit and risk fee provided.

[161] See FHA FORM No. 2432, para. 3(h)(2).

[162] Under present FHA procedures, if other than an independent architect is used for preparation of the working drawings, the entire architect's fee is payable to the mortgagor at initial closing or indorsement; and, thus, to the extent said fee is payable other than in cash, the cash available can be used to reduce cash requirements at closing. See FHA FORM. No. 2719-B and FHA FORM No. 2432 para. 3(h)(2).

[163] LOUIS WINNICK, RENTAL HOUSING: OPPORTUNITIES FOR PRIVATE INVESTMENT 143 (1958). Pages 143 through 154 of this book provide a very thoughtful discussion of both tax techniques and taxation policy. For briefer and earthier discussion, see Felix & McIntyre, *How to Save Money on Taxes*, House and Home, Oct. 1959, p. 193. See also Blum & Dunham, *Income Tax Law and Slums: Some Further Reflections*, 60 COLUM. L. REV. 447 (1960); Sporn, *Slums and the Income Tax: A Brief Rejoinder, id.* at 454.

[164] WINNICK, *op. cit. supra* note 163, at 151.

[165] Section 167(c), however, limits a taxpayer's right to use the so-called "double declining balance"

Accelerated depreciation on the double-declining balance method would initially amount to five per cent per annum on property with a forty-year life and, in the early years, would greatly exceed mortgage amortization payments on a forty-year mortgage. In all probability, there will also be sufficient depreciation in excess of amortization more than to offset the earnings permitted by the FHA rent ceiling, so that the project will show operating losses for income tax purposes. To the extent the mortgagor does not elect to capitalize interest, real estate taxes, and certain other items during the construction period, the mortgagor will generate a substantial tax loss prior to completion that can be carried forward by a corporate mortgagor. To the extent these items are expensed, the tax basis of the project upon completion will be reduced and the depreciation thereon will be somewhat less. The tax losses of the construction period and early operating period can, of course, be carried forward, subject to certain limitations, to subsequent years.[166] If, however, the owner has other income against which such tax losses can be supplied, he can immediately utilize such losses. Such immediate use to reduce taxes payable on other income, sometimes called "tax shelter," produces an economic benefit to the owner, the amount of which depends on the rate of tax that would otherwise be payable on the "tax-sheltered" income. The redeveloper's problem is to organize his mortgagor so as to utilize such tax benefits in a similar manner to the methods by which the benefits are utilized in conventionally financed real estate projects.

A project mortgagor may not, under current FHA rules and regulations, have any outside income.[167] If the redeveloper uses a corporate mortgagor, it will be necessary, in order to make use of the "tax shelter" generated, to have the corporate mortgagor file a consolidated income tax return with another corporation that is income-producing. A consolidated filing presumes that the redeveloper has another income-producing corporation, has made it the parent of the mortgagor,[168] has no objection to a consolidated financial statement showing the mortgage liability and thereby reducing the consolidated debt to equity ratio,[169] and that such other corporation has sufficient income to create an over-all tax saving that more than offsets the two per cent penalty for filing a consolidated return.[170] If the mort-

method of depreciation to assets constructed or erected after Dec. 31, 1953, or acquired after Dec. 31, 1953, if the original use of the property commences with the taxpayer and after said date. The purchaser of recently constructed and already occupied real estate may choose to acquire the stock of the owning corporation in order to preserve the identity of the taxpayer and continue to utilize the accelerated depreciation allowed by § 167(b)(2).

[166] Unless the mortgagor can use the tax losses during their carry-forward period against income derived other than from the project, it may elect to use straight-line depeciation rates. See WINNICK, *op. cit. supra* note 163, at 147.

[167] 24 C.F.R. § 263.9a(1) (1954).

[168] It might also be possible for the tax-loss mortgagor to have a sibling relationship with a profitable corporation under a common parent corporation that owns 80% or more of each of the siblings.

[169] Under some circumstances, it might be proper accounting for the parent corporation to present only its net investment in the mortgagor rather than to add the mortgagor's assets and liabilities into the total assets and liabilities of the parent.

[170] INT. REV. CODE OF 1954, § 1503(a). Note that certain public utilities and other consolidated companies are exempt from the 2% penalty.

gagor corporation is acquired solely to avoid taxes, however, the depreciation deductions may be disallowed.[171]

Another tax question that may confront a corporate mortgagor is the applicability of section 341 of the Internal Revenue Code of 1954 relating to "collapsible" corporations.[172] If, as is assumed, depreciation deductions will, for the first several years, exceed project income, it is difficult to see how section 341 would be deemed to apply, since distributions to the shareholders of the corporation would be treated as a return of capital, not as a dividend, the corporation having no current or accumulated earnings. After the recovery by the shareholder of his stock basis, any further distributions, again assuming no current or accumulated earnings, might be treated as ordinary income under section 341; but if such distributions are made more than three years after construction, section 341 would not ordinarily apply.[173]

Most real estate syndications in recent years have been in the form of limited partnerships or trusts, in order to permit investors to take the depreciation "tax shelter" directly against their personal income.[174] It is very difficult to apply most of the currently popular real estate syndication methods to section 220 projects and thereby permit redevelopment investment to compete on an equal basis for available real estate investment funds, because the FHA generally insists that the partners in a mortgagor partnership (or the sole proprietor, if personally owned) assume full personal liability on the mortgage note.[175] Since the FHA will accept a mortgagor corporation of minimum net worth, there is little reason, other than administrative

[171] Creation of a subsidiary corporation is an "acquisition" within the meaning of that word as contained in § 269. Coastal Oil Storage Co. v. Comm'r, 242 F.2d 396 (4th Cir. 1957). In the case of Elko Realty Co. v. Comm'r, 29 T.C. 1012 (1958), the disallowance by the Commissioner of deductions claimed as a result of a consolidated filing was upheld. The taxpayer corporation had acquired control of two § 608 mortgagor corporations that were in poor financial shape and, by a consolidated filing, attempted to offset the losses of its new subsidiaries against its own income. The *Elko* case may be read as a situation where the taxpayer simply failed to carry the burden of proving that its intent was not to evade or avoid taxes. The court observed that despite the taxpayer's insistence that it thought its two acquired subsidiaries would produce net income, the evidence showed that the taxpayer knew one of the subsidiaries to be in default on its FHA mortgage and that both were heavily in debt. It should be noted that the *Elko* case involved loss deductions generated after the date the subsidiaries were acquired, not "carry-forward" losses. The *Elko* case may also be interpreted, however, as applying only when the acquired corporation has an established historical loss pattern at the time it is acquired, and hence the case would be inapplicable to a newly formed mortgagor subsidiary about to begin construction of an urban renewal project.

[172] INT. REV. CODE OF 1954, § 341.

[173] See Axelrad, *Recent Developments in Collapsible Corporations*, 36 TAXES 893 (1958); Axelrad, *Tax Advantages and Pitfalls in Collapsible Corporations and Partnerships*, 34 TAXES 841 (1956).

[174] For an excellent article covering practical as well as tax aspects, see Berger, *Real Estate Syndication: Property, Promotion, and the Need for Protection*, 69 YALE L.J. 725 (1960). See also *The Growth of Group Finance*, Architectural Forum, Sept. 1958, p. 188. INTERNAL REVENUE CODE OF 1954, §§ 856-58 permit real estate investment trusts that would otherwise be taxable as corporations and that have 100 or more beneficaries to eliminate the corporate tax otherwise payable if they distribute at least 90% of their income. See Roberts, Feder & Alpert, *Congress Approves Real Estate Investment Trust; Exacting Rules Made*, 13 J. TAXATION 194 (1960).

[175] 24 C.F.R. § 263.9a(a)(1) (1954) deals with private corporate mortgagors, and 24 C.F.R. § 263.9a(a)(2) (1954) with private noncorporate mortgagors listing therein ". . . an association, partnership, trustee or legal entity other than a corporation. . . ." 24 C.F.R. § 263.9(a)(d) (1960) makes provision for individual mortgagors. 24 C.F.R. § 241.1(c) (1960) permits trust mortgagors in § 213 cooperative projects.

convenience, why it should not permit the use of so-called "bob-tailed" mortgage notes, which do not permit a deficiency judgment against the maker in the event that sale of the collateral does not realize a sufficient amount to pay the note. It was once thought that the permission for corporations of small size to elect to be treated as partnerships for tax purposes would solve this problem.[176] But subchapter S as finally passed is not applicable to a corporation with two classes of stock, as usually required by the FHA,[177] or with more than twenty per cent of its gross receipts derived from rent.[178]

The FHA has occasionally insured "bob-tailed" mortgage notes issued by trustees, and it has published a model form of trust.[179] These trusts have been used mostly in Massachusetts and Illinois, where such form of real estate investment is quite common, and the FHA has been reluctant to permit the use of trusts in other states because of what it believes to be generally unsettled law on many aspects of the validity of trusts established primarily to manage real estate.[180] If properly drafted, a trust that owns real estate may pass the unused depreciation deductions to its beneficiaries[181] or, if established as a *Clifford* or "peak through" trust,[182] its property is treated as the property of the settlor-beneficiary and the income or loss therefrom is treated as the income or loss of the settlor-beneficiary.[183] This is a fairly common method of group ownership of conventionally financed real estate.

[176] WINNICK, *op. cit. supra* note 163, at 252-53.

[177] *Cf.* Rev. Rul. 120, 1953-2 CUM. BULL. 130, ruling that the $100.00 of preferred stock issued to the FHA is not a "class of stock," but merely a security device so that a tenant-stockholder of a co-operative apartment corporation would not be deprived of his proportionate share of the corporation's deductible expenses under § 23(z) of the 1939 Code, which requires that "one and only one class of stock [be] outstanding."

[178] An FHA mortgagor corporation that does not capitalize with FHA preferred stock, control being provided by a Regulatory Agreement (but *cf. supra* note 177) and that is not a subsidiary of another of the redeveloper's corporations could qualify as a "small business corporation" under INT. REV. CODE OF 1954, §§ 1371 *et seq.*, as amended in 1958, and elect to be taxed as a partnership, but for the provisions of § 1372(2)(5), which state, in part, that ". . . an election under subsection (e) made by a small business corporation shall terminate if, for any taxable year of the corporation for which the election is in effect, such corporation has gross receipts more than twenty percent of which is derived from . . . rents. . . ." It should be noted that during the construction period, such a corporation could conceivably, prior to the realization of any rental income, pass tax losses on to its shareholders. Under INT. REV. CODE OF 1954, § 1244, as amended in 1958, a small business corporation may so issue its stock that upon sale by its shareholders at a loss or in the event the stock becomes worthless, the loss sustained by the shareholder is an ordinary rather than capital loss. Because of the requirement of § 1244(c)(1)(E) that ". . . such corporation . . ." must derive ". . . more than 50% of its aggregate gross receipts from sources other than . . . rents . . . ," it is impossible, once operations commence, for an FHA mortgagor corporation to qualify its stock under § 1244.

[179] FHA Form No. 2529.

[180] Creation of a trust to accept conveyance of an already existing project from the project mortgagor has not, as yet, been allowed by the FHA. A trust must be formed ". . . for the purpose of providing housing. . . ." 24 C.F.R. § 263.9a(a)(2) (1954). (The FHA has construed the word "providing" as if it were "constructing" and has taken the position that a trust entity that proposes to take over an existing project does not, therefore, qualify.)

[181] See INT. REV. CODE OF 1954, § 167(g); I.T. 2452, VIII-1 CB84 (1929); Commissioner v. Putnam, 143 F.2d 201 (2d Cir. 1944); McBride Building Trusts, 10 CCH Tax Ct. Mem. 13 (1951).

[182] Under INT. REV. CODE OF 1954, §§ 671 *et seq.*

[183] Special care must be taken in drafting the trust instrument, otherwise the trust may be deemed to be an "association" taxable as a corporation, I.R.C. Regs. 301.7701-2 *et seq.*

A trust mortgagor so formed by the redeveloper's income-producing corporation in lieu of a corporate subsidiary escapes the problems posed by section 269 (acquisition of corporation) and section 341 (corporate collapsibility) of the Internal Revenue Code of 1954.[184] In another respect, however, corporate mortgagors have an advantage over trust mortgagors. Because of depreciation deductions and the election to expense items of cost incurred during the construction period the project property will, in a few years, have a negative tax basis—*i.e.*, a tax basis for the collateral lower than the outstanding principal balance of the mortgage thereon. If a trust mortgagor sells a project with a negative basis, the taxable gain will be the difference between the proceeds of such sale and the depreciated basis of the project. If the stock of a corporate mortgagor is sold, the taxable gain will be the proceeds of sale less the outstanding principal balance of the mortgage and less the tax basis for such stock, which, under the assumptions made, would probably be zero.[185] The purchaser, if it is a corporation and if it liquidates the corporate mortgagor within two years after purchase, may obtain the same tax basis for the real estate as if it had purchased property instead of stock.[186] If a corporate mortgagor sells the project, of course, it has the same taxable gain as does the trust, unless it liquidates within the next following twelve months.[187]

Aside from tax considerations, the corporation form of mortgagor is preferable as being simpler with which to work when it comes to setting up contracts or leases

[184] Other problems of consolidated returns may also be avoided—*e.g.*, INT. REV. CODE OF 1954 § 1504 excludes certain types of corporations from the affiliated group that may file consolidated returns. See also J. D. & A. B. Spreckles Co., 41 B.T.A. 370 (1940), which suggests that there must be a business purpose for consolidation in addition to tax purposes.

[185] To illustrate: Assume a project with an estimated replacement cost of $10,000,000, a mortgage liability of $9,700,000, investment by developer of $300,000, accumulated depreciation on the date of the sale of the project of $1,000,000, amortization payments to the date of the sale of the project of $500,000, and a sale of the project for $9,500,000.

a. If a trust owns the project, the taxable gain would be $500,000—*i.e.*, sale price of $9,500,000 less the adjusted basis for the project of $9,000,000 (cost of $10,000,000.00 less depreciation of $1,000,000.00).

b. If a corporation owns the project and all of the stock of the corporation is sold (not the project itself) the taxable gain would be $300,000—*i.e.*, $300,000 selling price of stock (equity over the reduced mortgage debt of $9,200,000) less the adjusted basis for the stock of zero. The basis of the stock was originally $300,000 but was reduced as losses were used in filing a consolidated return. The basis of the stock, however, does not fall below zero.

See also Crane v. United States, 331 U.S. 1 (1947). In the *Crane* case, the Supreme Court upheld the Commissioner's determination that the taxable gain to the taxpayer upon the sale of encumbered property was the difference between the sales proceeds realized and the taxpayer's adjusted basis for the property, even though taxpayer's adjusted basis was less than the outstanding mortgage balance. The Court decided that the taxpayer received an economic benefit when she disposed of the property subject to the mortgage and rejected taxpayer's argument that her gain was only the sales price in excess of the outstanding mortgage amount. Some commentators interpreted *Crane* to mean "boot" was necessary above and beyond the outstanding mortgage balance before the *Crane* result would occur, but subsequent cases have held otherwise. See Parker v. Delaney, 186 F.2d 455 (1st Cir. 1950); Woodsam Associates, Inc. v. Comm'r, 16 T.C. 649 (1951), *aff'd*, 198 F.2d 357 (2d Cir. 1952). Abandonment, feasible if the mortgagor is not personally liable on the mortgage note, may involve no "sale or exchange" and hence no tax.

[186] INT. REV. CODE OF 1954, § 334(b)(2).

[187] INT. REV. CODE OF 1954, § 337.

and procuring insurance.[188] In certain states, the real estate tax concessions mentioned earlier are available to corporations and the statutes make no mention of individuals, partnerships, or trusts.[189] Lastly, the familiarity and experience of the FHA local offices with the corporate form of mortgagor makes for fewer problems at initial and final endorsement and in the later day-to-day operations with the FHA.

The choice of the mortgagor entity dictates the form of many of the documents to be supplied to the FHA at initial endorsement, the preparation of which next becomes the immediate concern of the redeveloper and his attorney.

3. *Preparing for initial endorsement*

Because of the increased documentation necessary to comply with FHA and FNMA requirements, initial endorsement is a real estate closing considerably more complex than when conventional financing is used. The local FHA office will supply a check list of the necessary documents and also copies and model forms. At the conclusion of initial endorsement, the local FHA director will endorse the mortgage note for insurance. If the project is divided into several mortgage parcels, an initial endorsement will be required for each parcel; but after the first time through the process, the problems will have been worked out and forms agreed upon with the FHA closing attorney so that the time required will be greatly reduced.

In order to speed up the closing, all documents to be submitted at initial endorsement should be cleared in advance, in rough draft form, with the FHA closing attorney who will be in charge of initial endorsement. If a corporate mortgagor is to be used, the capital structure of the corporation must include $100 of preferred stock[190] to be sold at initial endorsement to the FHA. The corporation's articles of incorporation, in addition to containing a great many requirements and prohibitions,[191] must grant to the preferred shareholder all the powers necessary for the

[188] There is a technical difficulty with mortgagor corporations organized under the law of most states other than New York, in which state the rule of Randall v. Bailey, 261 App. Div. 907, 25 N.Y.S.2d 173 (2d Dep't 1941), *aff'd*, 288 N.Y. 280, 43 N.E.2d 43 (1942), permits dividends out of unrealized appreciation. Although the FHA standard corporate charter permits dividend distributions from "surplus cash" whether or not there is a book surplus, most state laws do not permit this. See, Note, *Statutes, Case Law, and Generally Accepted Accounting Principles on the Write-up of Physical Assets*, 28 U. CINC. L. REV. 79 (1959). Thus, the mortgagor might be in default under its charter requirement that it comply with applicable state law. *Cf.* Mountain State Steel Foundries v. Comm'r, 18 CCH Tax Ct. Mem. 306 (1959), *rev'd* 284 F.2d 737 (4th Cir. 1960).

[189] See *supra* p. 124.

[190] In some states, the type of preferred stock required by the FHA may not, under applicable statutes, be permitted. In such instances, the mortgagor corporation is capitalized without the $100 of preferred stock and must execute with the FHA a Regulatory Agreement (see 24 C.F.R. § 263.9a(a)(1) (1954)) that, by contract, gives to the FHA all the powers it would normally possess as an incident of the ownership of the preferred stock. In qualifying or registering the stock of the mortgagor corporation with the state "blue sky" authorities, consideration should be given to the question of whether or not the existence of the FHA preferred stock presents any complications. In Ohio, for instance, the existence of FHA preferred stock eliminates a rather simple qualification procedure under OHIO REV. CODE § 1707.03(p) (1954), and requires instead a more complicated filing under OHIO REV. CODE § 1707.06 (1954).

[191] For example, the articles require the mortgagor to file a dwelling and nondwelling (if commercial units are included in the project) rental schedule and adhere to such schedules, to establish a replacement

FHA to regulate many of the internal practices of the corporation with respect to the operation of the project and must also permit the preferred shareholder to assume control of the corporation in the event of default.[192]

The form of FHA construction contract to be used and the arrangement between the mortgagor and general contractor to be established depend on whether or not the mortgagor and general contractor have established an "identity of interest" for FHA purposes.[193] If the architect employed by the mortgagor is independent (no "identity of interest"), he can continue to serve as the architect of the project during construction. If he is not independent, he cannot so serve, and the mortgagor must hire an independent architect for the period commencing with construction. In either event, architectural contracts are included in the closing documents.[194]

A sample form of title policy insuring the mortgage in its principal amount should be procured and submitted to the FHA closing attorney, as well as building permits and evidence that the project to be constructed will violate no zoning ordinances. Letters of assurance of service from all necessary utility companies should be obtained for the closing, and any utility easements that will be executed prior to initial endorsement should be approved as to form by the FHA closing attorney. Because so many of the FHA reports require independent certification, the redeveloper should during this period employ independent public accountants and acquaint them with the FHA rules and regulations.

reserve and make payments monthly thereto, to make periodic reports, to submit monthly occupancy reports, and to notify the FHA of any transfer of shares in excess of 25% of the outstanding common shares of the corporation. The articles prohibit conditioning occupancy on payment of additional rental for chattel property in the project such as stoves and refrigerators, discrimination in leasing against families with children, renting any unit for less than thirty days, and recordation of any covenant embodying discrimination because of race, color, or creed. The by-laws or code of regulations, except for incorporating by reference all of the restrictions of the articles above mentioned, can follow the pattern of local law.

[192] The legal basis of such control is contained in 24 C.F.R. § 263.9a(a)(1) and (2) (1954). If a trust mortgagor is to be used, a trust indenture, FHA Form 2529, and a regulatory agreement, by the terms of which the FHA will obtain the same control over the project as it would if it owned preferred stock, must be prepared.

[193] See *supra* pp. 150-51, for discussion of "identity of interest." A lump sum fixed fee contract, FHA Form 2442 (§ 220), is used if no "identity of interest" exists. A cost-plus with guaranteed upset price contract, FHA Form 2442-A (§ 220) is used if an "identity of interest" exists. If the general contractor subcontracts more than 50% of the work to one subcontractor, or more than 75% of the work to three, in an "identity of interest" situation, the builder's and sponsor's profit and risk fee will be reduced. See FHA Form 3306.

[194] See FHA Forms No. 2719-A, 2719-B, and 2719-C. Form No. 2719-A is applicable to an independent architect who continues to act as architect throughout the construction period. This form contains a certification by the architect that he is independent of the mortgagor. If such an architect has been rendering services to the redeveloper, he may have a contractual relationship with the redeveloper covering the entire project and containing terms different from those of Form No. 2719-A. It would not appear, however, that paragraph 2 of said form, which voids all prior agreements between the parties, would affect such an arrangement, see *supra* note 128. Form No. 2719-B provides for the services of a nonindependent architect that terminate at initial endorsement, at which time such architect is paid in full. Form No. 2719-C provides for an independent architect whose services are primarily concerned with supervising construction beginning with initial endorsement and running through the construction guarantee period following completion of construction. Most large FHA offices adequately staffed with project inspectors will not require a project architect or Form No. 2719-C.

Any debt financing that the mortgagor obtains in addition to the FHA mortgage should be evidenced by a deferred note, the form of which should be reviewed by the FHA closing attorney.[195] Secondary financing that creates a lien against the mortgaged project is not permissible.[196] Finally, the redeveloper's attorney must prepare a comprehensive legal opinion covering the validity of the mortgagor entity under local law and the authority of the mortgagor and its officers to execute the various closing documents.

4. *Initial endorsement*

If the closing documents have been cleared in advance with the FHA closing attorney, initial endorsement should be more or less a routine formal delivery of papers. At initial endorsement, the mortgagor also submits to the mortgagee, who, in turn, submits to the FHA, the first request for advance of mortgage proceeds,[197] which includes the cost of the land, expenses of title and recording work, the FHA application and commitment fees, legal and organizational services, and cost of insurance, all of which the mortgagor pays to itself as reimbursement; all (if the architect is dependent) or seventy-five per cent (if he is independent) of the architect's fee which is paid to the architect (or used to reimburse the redeveloper for architectural advances made by him); and the FHA initial insurance premium and mortgagee's service charge,[198] which are payable to the mortgagee.

A payment of two per cent of the principal mortgage amount is made to the mortgagee to establish the "working capital" escrow discussed below, and there will have to be escrowed the cost of off-site improvements not included under the mortgage.

B. Problems During Construction

1. *Disbursement of mortgage proceeds*

Each month, once construction begins, the general contractor will submit to the mortgagor his application for payment setting forth his costs incurred to date, less ten per cent, and the over-all percentage of the construction already completed, including material stored on the site.[199] A percentage of his general overhead and, depending on his fee arrangements, part of his fee is also requested. The architect certifies the request of the general contractor, and the mortgagor incorporates this

[195] Any such note must be in a form approved by the FHA and can be paid only in conformity with FHA rules and regulations—*i.e.*, out of "surplus cash." 24 C.F.R. § 232.19b (1958); 24 C.F.R. § 263.9a (1954).

[196] 24 C.F.R. § 232.18(b) (1954). Public mortgagors may create junior liens under certain circumstances.

[197] FHA Form No. 2403.

[198] Rev. Rul. 56-136, 1956-1 CUM. BULL. 92 indicates the mortgagor during the construction period may deduct such payment as it would interest.

[199] FHA Form No. 2448. This form is matched by the local FHA office with the general contractor's "Trade Payment Breakdown," FHA Form No. 2536, submitted at closing and incorporated as a part of the construction contract. It should be noted that some contractors will attempt to "front-load" cost estimates on the subtrades. By overestimating the cost of the trades that are completed first (*e.g.*, excavation) and underestimating the trades that are completed last (*e.g.*, landscaping), the general contractor may draw down more money earlier in the job than would normally be permitted.

certification into its own monthly request for advance of mortgage proceeds (FHA Form 2403), adds thereto any items to which the mortgagor is entitled, and submits the request to the mortgagee. The mortgagee approves the request and submits it to the FHA, where it is processed and approved, either in the amount requested or a lesser amount if items are disallowed or if the FHA project inspector disagrees with the contractor's estimate of the percentage of the job that is completed.

Prior to disbursement of the monthly amount requested, a cautious mortgagee may require a report from the title company that has insured the mortgage to the effect that no liens have been filed against the project property. If a lien is filed, it must be removed by payment, posting a bond,[200] or such other remedy as may be available under state law; otherwise, no disbursement of mortgage proceeds will be made. If the general contractor has materials stored on the site at the date the mortgagor requests a mortgage advance, it may be necessary to have the general contractor assign its interest in the materials to the mortgagee, and both the general contractor and mortgagor execute affidavits as to the safety of storage facilities, insurance, and so on.[201]

2. *Change orders*

As construction progresses, change orders in the original plans will be required or desired. Using the applicable FHA forms,[202] the mortgagor requests the FHA to approve the change order, which may involve an increase, decrease, or no change in cost. An increase in cost, if approved by the FHA, may involve no ultimate out-of-pocket expenses to the mortgagor if the general contractor is making cost savings elsewhere in his work.[203] If the proposed change order is not approved by the FHA or is approved but there are no offsetting savings being made by the general contractor, it may be necessary for the mortgagor to waive an additional portion of his profit-and-risk fee to finance the changes without incurring additional out-of-

[200] Some state statutes void the lien of record if the property owner gives the lienor notice to foreclose on his lien and posts with the court a bond double the amount of the lien. The bond theoretically substitutes for the land as the lienor's security. In practice, this has proved to be a cumbersome and almost unworkable procedure. Most surety companies require the property owner to escrow with them the amount of the bond, and some title companies refuse to omit the lien from the title report even though the state statute is complied with. In Ohio, some courts refuse to discharge the property from the foreclosure action even though a bond is posted. Some title companies will omit the lien from a title report if cash in the amount of the lien is deposited with the title company. Most title companies that follow this procedure, however, also demand an authorization from the property owner to pay off the lien if a foreclosure petition is filed by the lienor, without any regard to the merits of the lien claim or the lien and without any judicial determination of same.

[201] FHA Forms No. 2468-A and 2468-B.

[202] FHA Form No. 2437.

[203] Occasionally, the redeveloper may leave stoves and refrigerators out of his original specifications but include them by additive change order if construction cost savings develop. This is the second point at which the redeveloper's attorney must determine whether or not a chattel mortgage is necessary. At initial endorsement, he must, in his opinion letter, advise the mortgagee and the FHA whether or not, under state law, a chattel mortgage is necessary to cover items already included in the working drawings submitted to the FHA. At the time chattel property is placed with the mortgagee as additional collateral, the regular state form of chattel mortgage may be used. The Federal National Mortgage Association (FNMA) may, however, require the real estate mortgage to be amended to include the chattel property.

pocket expenses. If the change order is deductive (reducing the estimated replacement cost of the project as estimated by the FHA), a concurrent additive change order (perhaps mortgaging chattels) may be required in order to prevent the FHA from reducing the amount of its original commitment to insure.

During construction, the redeveloper may request an increase in the mortgage because he believes that certain added costs of construction will produce sufficient increase in rentals to service the increased debt or because he believes that some factor that prevented him from obtaining a maximum mortgage has been overcome.[204] In considering whether or not to issue an amended commitment to insure for an increased mortgaged amount (assuming the present mortgagee is willing to lend an additional amount), the local FHA office will re-analyze the entire project. This may prove undesirable if the FHA concludes its earlier estimate of expenses was too low or its estimate of income too high, since a new analysis, even with the chattel property mortgaged, could produce an FHA-amended commitment to insure in a lesser amount than the original commitment.[205]

3. *Working capital escrow*

The two per cent working capital escrow is established with the mortgagee at initial endorsement to insure that funds will be available for the payment of real estate taxes, hazard insurance, FHA mortgage insurance premiums attributable to the project, and the payment of the initial cost of equipping and renting the project. The disbursement of these funds is arranged solely between the mortgagor and the mortgagee, and the FHA does not supervise the application for or the payment of same. Periodically, commencing with the beginning of the rental program, requests to the mortgagee for disbursements from the working capital escrow by the mortgagor to reimburse the mortgagor for expenses (gas bills, maintenance, advertising, model "show" suite furniture, etc.) incurred to date are made in simple letter form accompanied by a list of items covered by the request. Submission of paid bills and receipts may be required by the mortgagee. If preclosing rentals are sufficient to cover these costs,[206] ultimately the deposit in the working capital escrow will be returned to the redeveloper.

[204] It may also be necessary to procure a new commitment from the FNMA to purchase the increased mortgage. It cannot be presumed that the original FNMA commitment is "open-ended" and covers any and all increases during construction.

[205] Upon collateralizing the increased mortgage amount requested, the FHA will rework its Project Income Analysis and produce a new annual amount to be contributed by the mortgagor to the "Reserve Fund for Replacements," which, in turn, will require an amendment by the mortgagor to its by-laws or code of regulations, if a corporation, or the trust indenture and/or regulatory agreement, if a trust.

[206] Although the FHA requires that an advance amortization payment be made from any net income from preclosing rentals, most of the items for which the 2% working capital escrow is established may be expensed against the preclosing rentals in determining the "net income from date of initial occupancy." See FHA Form No. 3307 and FHA Memorandum dated Nov. 5, 1956, § 207, RH-237, and § 220(d)(3)(B), No. 35. In addition, certain fixed charges (*e.g.*, interest, taxes, insurance, land rents) may be allocated from the construction account to preclosing rental expense, thereby creating a construction cost underrun on these items. It is thus to the redeveloper's advantage to seek tenants as rapidly as individual units become available.

4. *Occupancy—FHA requirements*

Prior to the occupancy of any unit of the project, a dwelling rental schedule[207] must be submitted to the local FHA office setting forth the rents the mortgagor proposes to charge for each type of unit in the project. The rents to be charged by the mortgagor need not be the exact per unit rents used by the FHA in analyzing the economic feasibility of the project, but they must average out to no greater than the maximum per room rent specified for the project by the FHA in its project income analysis form. The mortgagor, therefore, may, to an extent, "merchandise" his suites by charging more for preferred locations and possibly adjusting the rentals to meet market demands for various-sized suites. Specified charges for leasing of ranges, refrigerators, and other chattel property may be made by the mortgagor if the FHA approves the charge and if such leasing is purely voluntary and not made a condition prerequisite to the leasing of an apartment. Such charges are permissible even if, when added to the basic rental, they exceed the FHA's ceiling on per room rents.

Prior to the occupancy of each unit, the mortgagor must procure from the local building department of the city a letter stating that the apartment building of which the unit is a part has been satisfactorily completed in accordance with the city building code. This letter is then submitted to the FHA together with an FHA form entitled "Permission to Occupy,"[208] and approval to occupy, following a visit by the FHA project inspector, is usually forthcoming.

Once occupancy begins, monthly statements as to occupancy, rentals, and expenses must be submitted to the local FHA office.[209]

5. *Real estate taxes*

On the next tax assessment date following the beginning of construction, in most states, a portion of the construction in place will be listed on the county tax duplicate (unless real estate tax concessions are, by state law, granted to urban renewal projects).[210] In some jurisdictions, when building permits are issued, the taxing official automatically sends to the owner affidavits of building cost as of the tax assessment date. In figuring the cost of the improvements in place as of such tax assessment date, it is sometimes permissible to exclude the general contractor's profit and architect's fees and list only the dollar cost of bricks, mortar, and construction labor. If such affidavits are not utilized by the jurisdiction in which the project is situated, the mortgagor may have no control over the final tax assessment and will, if he believes the ultimate assessment to be too high, have to resort to the customary protest procedures of filing a complaint with the local county board of revision.

[207] FHA Form No. 2458. Requirement of submitting such a form is contained in a corporate mortgagor's articles of incorporation, and, by incorporation by reference, in said mortgagor's by-laws or code of regulations, and in the regulatory agreement covering a trust mortgagor.

[208] FHA Form No. 2485.

[209] This requirement is imposed by the articles of incorporation or regulatory agreement of the mortgagor.

[210] See *supra* pp. 123-24.

C. Completion

1. Cost certification and advance amortization procedures

Upon completion of construction, the mortgagor (and, if an "identity of interest" arrangement exists, the general contractor) must certify actual costs to the FHA office.[211] The mortgagor's cost certification (which incorporates, as an item therein, the total actual costs of the general contractor) must be prepared and certified by an independent public accountant. Savings by the general contractor in basic construction costs may be balanced, for cost certification purposes, by the additional cost of FHA-approved change orders. Such construction cost savings may also be balanced by expenditures for FNMA permanent financing, which presently total two and one-half per cent of the principal mortgage amount. Any construction costs in excess of the original FHA estimate, however, plus or minus approved change order costs, can be cost certified but may be disallowed. Fees established for legal and organizational expenses, general contractor's general overhead, and architect's fee, if exceeded, may be disallowed to the extent of such excess.[212] But this is a matter of explanation and negotiation with the local FHA office, which may allow such excess expenses under appropriate circumstances.

If rentals have been collected prior to cost certification, the mortgagor must supply the local FHA office, simultaneously with cost certification, a profit and loss statement from the date occupancy began to the date of cost certification and, perhaps, make an advance amortization payment.[213] The administrative rules and regulations of the FHA, to prevent "mortgaging out" as was done under the section 608 program, also require a redeveloper to make a minimum cash investment equal to three per cent of the actual project cost as certified at completion.[214] The equity investment, which may not be withdrawn for three years, will usually have been made by any redeveloper who is not also a builder. If the full three per cent has not been invested by the redeveloper, he will have to make a cash deposit to bring his total cash investment up to three per cent.

After reviewing the cost certification and calculating the advance amortization payment, if any, the local FHA office issues Form 2580, "Maximum Insurable Mortgage," stating the maximum insurable mortgage that FHA will insure to be the amount cost certified (after disallowances and deductions) or the amount specified in the original commitment to insure, whichever is less.

Upon completion of the above procedures, the FHA project inspector inspects

[211] FHA Forms No. 3378 (mortgagor) and 3378-A (general contractor). Cost certification takes place simultaneously with the so-called "next to the last" draw—the request for payment of the retained percentage due the general contractor. The last draw or request relates to payment of the balance of mortgage proceeds held by the mortgagee and consists of nonconstruction items, primarily the balance, if any, of the profit and risk fee.

[212] The new forms of architect's contract, FHA Forms No. 2719-A and 2719-C, provide for an adjustment in the architect's percentage fee if approved additive change orders increase the cost of the project.

[213] See *supra* note 206.

[214] 24 C.F.R. § 232.18(g) (1956).

the project, notes the items of delayed completion,[215] and certifies the project as complete except for such items. An escrow agreement is executed between the mortgagor and mortgagee establishing an escrow in twice the amount of the FHA estimated cost of completing the items of delayed completion,[216] and thereupon the balance of construction funds held by the mortgagee (the ten per cent retention) is distributed.

2. *Final endorsement*

Thirty days after FHA certification that the project is complete (except for delayed completion items), the mortgage note may be finally endorsed. Final endorsement, as contrasted with initial endorsement, is quite simple and does not require the presence of the FHA closing attorney. Many of the necessary documents will have been submitted during the course of construction. A final site survey, showing the location of the buildings on the project property and compliance with set-back lines, an opinion letter of the attorney for the mortgagor, a request for final endorsement of the credit instrument,[217] and an updated policy of title insurance[218] are among the principal papers submitted. Prior to the procurement and submission of the title insurance policy, a completion certificate should be obtained, in recordable form, from the LPA and recorded in order to cancel of record any penalties or reversions that would have resulted from the failure of the redeveloper to complete construction.[219] The mortgagor should also obtain and record, prior to procuring the title insurance policy, any necessary reciprocal easement agreements with adjacent redevelopers or property owners relating to utility and sidewalk easements and rights-of-way. Such agreements should be cleared in proposed form with the local FHA office and with the FNMA. Lastly, the mortgagor will submit its request for any balance of the mortgage proceeds still held by the mortgagee, which, assuming everything else to be in order, will be paid. Thereupon, the mortgage note is submitted to the FHA for final endorsement.

3. *Sale of mortgage and mortgage note*

If the interest on the project mortgage is at the time of final endorsement higher than current conventional interest rates, the mortgagor may desire that the mortgage note not be sold to the FNMA at the agreed one per cent discount and one-half per cent purchase fee.[220] On the other hand, if the interest rate on the project

[215] Most typically, this will be landscaping work in the event that final endorsement takes place during a nonplanting season.

[216] FHA Form No. 2456. The funds so escrowed are disbursed when the FHA project inspector, acting on the request of the mortgagee, inspects the site and certifies the delayed completion items to be completed. The escrowed amount is double the FHA estimated cost of completion, and subsequent to completion, the mortgagor must cost-certify, informally, the actual cost of completing the delayed completion items.

[217] FHA Form No. 2023.

[218] Naming both the Federal Housing Commissioner and the FNMA as the insureds.

[219] This is required by the FNMA, and the title policy should be written with an eye to FNMA requirements.

[220] See *supra* note 145.

mortgage at such time is lower than current conventional interest rates, the construction mortgagee will want to sell the mortgage note to the FNMA as quickly as possible and usually will request the help of the attorney for the redeveloper in assembling the necessary documentation.[221]

The FNMA requires certification letters from the FHA as to the validity of the mortgage deed, requires FHA certification that it approves the articles of incorporation of the mortgagor, and requires certification by the FHA that such exceptions as are shown on the title insurance policy do not, in the FHA's opinion, affect the FHA appraised value of the project.[222] It will, in all probability, be necessary to supply the FNMA with a new, updated policy of title insurance, since the FNMA requires a policy to be dated within thirty days of the purchase by the FNMA of the mortgage and note, and it will normally take more than thirty days after the FHA final endorsement to consummate the sale to the FNMA. It is also necessary to supply a comprehensive opinion letter, an occupancy report indicating occupancy trends, photographs of the project, and a current profit and loss statement of the mortgagor. Hazard and fire insurance policies, which at the completion of construction were changed from "builder's risk" form to permanent form, must be amended to include the FNMA as an insured. The real estate and chattel mortgages must be assigned and the assignment recorded. The FNMA will not purchase the mortgage and the note if the mortgagor is already in default on same, and as a prerequisite to such purchase, the mortgagor must bring the mortgage note current. Thereafter, the mortgagor may, if it is necessary, make a request for a moratorium on amortization payments and payments to the replacement reserves.[223]

VII

OCCUPANCY AND OPERATION

A. Commercial and Industrial Redevelopment Properties

The occupancy and operation of commercial and industrial properties built under a redevelopment program should not differ at all from usual circumstances. The area may be somewhat better planned and better zoned, because of the absence of nonconforming uses. Except for parking garages, where rates may be regulated,[224] and except for convenience shopping in residential areas, the LPA usually will not seek to retain any control over completed commercial and industrial property, and it will be regulated only by ordinances and codes that apply to the general community.

[221] FNMA requirements may be found in the FNMA, SELLER'S GUIDE.

[222] These certifications may be in letter form from the FHA to the FNMA.

[223] The FNMA requirements and procedures relating to modifications of the original mortgage terms are contained in FNMA, SERVICER'S GUIDE reg. 115.

[224] There has been a great deal of litigation about the constitutionality of municipally supplied parking facilities. Sometimes they are attacked because rates are not regulated and sometimes because they are. See, *e.g.*, Foltz v. City of Indianapolis, 234 Ind. 656, 130 N.E.2d 650 (1955); Omaha Parking Authority v. City of Omaha, 163 Neb. 97, 77 N.W.2d 862 (1956). *Cf.* Denihan Enterprises, Inc. v. O'Dwyer, 302 N.Y. 451, 99 N.E.2d 235 (1951).

Many LPAs apply special restrictions on convenience shopping areas not only to achieve harmony with the plan for the related residential property, but also to protect the economic value of any larger shopping centers contemplated by the redevelopment plan to be constructed in the vicinity. Counsel for the redeveloper should resist the desire of some LPAs to make these restrictions very comprehensive and then to insert them into the granting deeds, possibly as covenants to run with the land enforceable by any tenant in the related residential property and waivable only by all the tenants.[225] The larger shopping center may never be built, and expansion of the convenience shopping may become essential to attract tenants to the related residential areas. Changing shopping habits may switch the types of goods and services appropriate for convenience purchasing areas. For example, modern dry cleaning equipment sufficiently safe and simple for operation in neighborhood stores and the newly popular self-operated laundry centers have both had considerable zoning difficulty and in some cities would be excluded from the convenience shopping areas by the language of proposed land disposition restrictions. If the LPA does insist on such restrictions, possibly because they have been frozen into prebid plans and documents, counsel should make sure that the LPA can amend or waive them with as little additional outside participation as possible and that some successor (perhaps the mayor) is designated to the powers of the LPA in the event of its termination without a succeeding entity.

B. Residential Redevelopment Properties

The occupancy and operation of completed residential properties built under a redevelopment program will differ in a number of ways from usual circumstances. If FHA financing has been used, a rental ceiling will be set by the FHA with which the redeveloper must comply.[226] If a property management firm is used, the contract with it should reflect some of the peculiar problems of residential urban redevelopment,[227] and, more important, the property management firm's personnel on the site should be alerted to the special problems they may encounter. These problems derive almost entirely from the fact that in the larger redevelopment projects, the redeveloper is doing much more than just managing a number of

[225] In one city where an important redevelopment official despises flashing neon signs, a covenant that runs with the land in the grant deed perpetually prohibits them, and only a Horatius-at-the-bridge stand by the redeveloper's counsel reduced the prohibition to a covenant from a condition subsequent with reverter. See *supra* note 90.

[226] Aside from FHA enforcement, tenants may directly sue for overcharges, Parkin v. Damen-Ridge Apts., 348 Ill. App. 428, 109 N.E.2d 363 (1952); even if the overcharge is made indirectly by means of a rental agency owned by the landlord that charges commissions. Brinkmann v. Urban Realty Co., 10 N.J. 113, 89 A.2d 394 (1952).

[227] The FHA, if it insures the mortgage on the property, will require that the right be reserved in the management contract for cancellation without cause by the FHA if it takes over the project. Some FHA offices also wish the FHA rental schedules to be stated in the management contract, but this is best handled by a general provision requiring the managing agent to change the FHA rentals as established from time to time. In addition, the managing agent's contract should provide that units cannot be leased for periods of less than 30 days or discriminate against families with children.

apartment houses—he is running a new community, and the residents may occasionally act more like free citizens than tenants.

A good part of such a tenant attitude reflects the fact that government has been deeply involved in the project, and the publicity may have left a community misunderstanding that the redevelopment apartments are some sort of middle- or upper-class public housing. If the governor laid the cornerstone and the mayor welcomed the first tenant, why shouldn't the state house or city hall see that rents are lowered or forgiven when a tenant is out of work or see that better dryers are put in the laundries? This public relations problem may be intensified by a political vacuum created when the area was demolished and that will have been filled by enough new tenant voters to control, perhaps, the election of the local city councilman if the council is elected by wards rather than on a city-wide basis. Some candidate may even be unable to resist promising lower rents and better laundries.

The redeveloper's solution is a well thought-out public relations program for the tenants right from the start, emphasizing that they are tenants of a private owner and that, upon completion, only the FHA rent controls distinguish the project from other private apartments—and, indeed, the FHA rent controls apply to many other apartments outside the redevelopment area. A second public relations problem is to explain to the city officials that in the long run, they are better off seeking a little less publicity and credit as the project is completed and concomitantly receiving a lot less aggravation and blame if a toilet overflows or a roof leaks.

The planning and architecture of large redevelopment projects is often designed to encourage the development of community spirit. For example, instead of many separate entrances, each opening on a public street as in a traditional city apartment block, the buildings may be grouped with path plans, and there may be sitting areas and common rooms. As the paternal industrialists discovered who saw their company unions joining the CIO in the 1930's, redevelopers who build developments so designed and then fail to anticipate, understand, and negotiate intelligently with group action may discover that, like Frankenstein, they cannot control their creation. Tenant-association agitation, rent strikes, and the like are better prevented by astute planning than resisted by court actions. Most of the law on tenant associations has been created in New York City by tenant associations organized to resist landlord attempts to raise rents under the New York rent control act or to oppose the "cooping" of rental properties.[228] Peaceful picketing by tenant associations is legal, but

[228] The New York State Rent Control Act makes specific provision for tenant committees and contemplates action by them in enforcing tenants' rights generally in Rent Commission proceedings. See N.Y.S. Rent Comm'n Regs. § 91. In Barnes-Arno Building Corp. v. Hoffman, 89 N.Y.L.J. 1324 (1933), the New York court refused to enjoin a group of tenants from peaceful picketing in support of a dispute between them and the landlord concerning the amount of rent to be paid, although they were enjoined from doing any willful damage to the property. The New York courts have, however, enjoined anyone not a tenant from picketing the premises in connection with a property dispute on the ground that there was an insufficient property interest in the controversy. Birnbaum v. Margosian, 89 N.Y.L.J. 1323 (March 6, 1933). While the New York courts have sanctioned peaceful picketing generally in public places, it has been held that picketing in nonlabor disputes upon private property does not come within the scope of the rule. See Sea Gate Ass'n v. Sea Gate Tenants Ass'n, 168 Misc. 742, 6 N.Y.S.2d

the use of false or misleading placards can probably be enjoined.[229]

Another tenant problem is nondiscriminatory or so-called "open" occupancy. The FHA will not permit discrimination to be required by a recorded covenant,[230] and this is about as far as the land disposition agreements of many LPAs go.[231] Other LPAs, however, may insert antidiscrimination provisions in the disposition documents, and the local Negro leadership will be aware of them. A recent New Jersey case has upheld a state ban on racial discrimination in housing assisted by FHA financing.[232] To the extent that a high percentage of the cleared areas were occupied by Negro tenants, there will be a feeling in the Negro community and to some degree in the general community that the desire of Negroes to live in the new properties should not be denied. The redeveloper may, therefore, have to accept a small role in solving the minority problem, and individuals unwilling to undertake the operation of integrated housing are best advised to avoid redevelopment.

Finally, the redeveloper during the initial rent-up period may find that the

387 (Sup. Ct. 1938); 70 C.J.S. *Picketing* § 1 (1951). Recently, a city-wide organization of tenants' committees has been organized in New York City, primarily to lobby for continuation of rent control.

[229] See Bernstein v. Retail Cleaners & Dyers Ass'n, 31 Ohio N.P. (n.s.) 433 (C.P. 1934), where a retail dry-cleaning establishment was picketed by an association of retail cleaners and tailors, alleging violations of the Code of Fair Competition for the dry-cleaning industry. In denying an injunction, the court made the following observations:

"Picketing, so-called, is a method long established as legal, where not accompanied by intimidating and importunate conduct, as a means of endeavoring to settle economic disputes existing between workers and employers. . . . It has also been frequently used by groups desiring to accomplish political objectives. It is a publicity mechanism, designed to advise the public of the existence of a present controversy between those picketing and the one picketed. . . . But if the objective is the honestly believed correct disposition of a real and existing economic dispute, it is legal. . . . The picketing program has rarely been resorted to by others than labor unions, but in reason, so it seems to me, there is no real distinction between the right of union members so to do and the right of the defendants, under circumstances prevailing in the present emergency, likewise to act." *Id.* at 435-36.

[230] See art. VIII of model form of articles of incorporation and para. A(13) of model form of regulatory agreement.

[231] See *Nondiscrimination Clauses in Regard to Public Housing, Private Housing and Urban Redevelopment Undertakings*, 15 J. HOUSING 27 (1958). There has been criticism of the federal housing programs for their cautious action in regard to segregation. See quotation from U.S. COMM'N ON CIVIL RIGHTS (1959), quoted in House and Home, Oct. 1959, p. 54. At least one important national redeveloper regards the open occupancy problem as greatly exaggerated and unlikely to affect financial feasibility of long term investment in urban renewal projects. See testimony of James H. Scheuer in *Hearings on Housing Before United States Commission on Civil Rights* 282, at 293-94 (1959).

[232] "Congress did refuse to accept amendments to various versions of the National Housing Act . . . which would have expressly prohibited the discrimination with which plaintiffs are charged. . . . But to construe this against state laws having the same effect is not warranted by the circumstances. Failure of Congress to incorporate in the National Housing Act a positive imposition of a policy of nondiscrimination with its necessary national implications, may be grounded in political expediency to secure its enactment, and in any event, such a provision would not account for local conditions and the effect of such a policy, on a local basis, on the national housing program. But state laws incorporating such a policy taking into account and being expressly designed to meet purely local conditions and attitudes, are not subject to the same difficulty." Levitt and Sons, Inc. v. Division Against Discrimination in State Dep't of Education, 31 N.J. 514, 535, 158 A.2d 177, 188 (1960). For earlier comments, see Lehman, *Discrimination in FHA Guaranteed Home Financing*, 40 CHI. B. REC. 375 (1959); Comment, *Builder of FHA Housing Held Barred from Discriminating Against Purchasers on Basis of Race: Possible Sources of Federal Prohibition and Bases for Cause of Action*, 59 COLUM. L. REV. 782 (1959); Note, *The New Jersey Housing Anti-Bias Law: Application to New State Aided Developments*, 12 RUTGERS L. REV. 557 (1958).

project will not be self-sufficient as early as he had hoped. This usually reflects the fact that total redevelopment is needed before good occupancy rates can be attained. Until the new shopping center, the refurbished school, the improved park, the more frequent bus service, and the better street lighting are finished—or at least obviously well toward completion—tenants will be reluctant to move into the redeveloped neighborhood.[233] Some of these facilities, however, both commercial and governmental, are difficult to start before the tenants move in. It is the chicken-or-egg-first problem, and both the FHA and the FNMA have been obliged to recognize this with mortgage loan accommodations. The FHA and the FNMA have regulations permitting a moratorium on principal payments and payments to the replacement reserve[234] and have thus partially recognized that the first projects in a large redevelopment area will require additional time for rent-up. The more suitable financing pattern, however, would be one where no debt-service payments commenced until substantial renting-up of the project was completed, and this would require a longer construction loan period with a capitalization of interest rather than a moratorium agreement. In many communities, the local real estate tax authorities have also recognized that the real property assessment must be depressed for an oasis of new construction in a desert of slum and demolition.

VIII

SALE OR REFINANCING OF AN URBAN REDEVELOPMENT PROJECT

If the redeveloper has been careful to obtain and record completion certificates, his title and right to transfer should be clear and the tax considerations of such sale or refinancing will be the same as is the case with most other real estate transactions. First, any sale of the project within three years of completion will create the possibility of ordinary income instead of capital gain treatment under the collapsibility rules of section 341.[235] Second, since the project will have been heavily mortgaged and depreciation will have reduced the tax basis below the principal due on the mortgage note, the project is likely to have a negative basis, so that the capital gain will exceed the consideration received by the seller to the extent of the gap between the tax basis and mortgage balance.[236]

For the second of the above reasons, the redeveloper may decide to refinance rather than to sell. Upon refinancing, assuming the collapsibility rules would not apply, no gain is realized, and if the corporate redeveloper has no realized earnings and profits (which it should not have if it has been taking accelerated depreciation), it

[233] See *Report on Detroit's "Gratiot" Redevelopment Project*, House and Home, Oct. 1959, p. 55.

[234] See 6 FHA, PROJECT MORTGAGE SERVICING bk. A, pt. C, para. 644.10; FNMA, SERVICER GUIDE reg. 115.

[235] See discussion *supra* p. 159 and citations at *supra* note 173.

[236] A sale of the mortgagor's stock rather than a sale of the project by the mortgagor would produce different tax results. See discussion of Crane v. United States, *supra* note 185. The *Crane* rule may not apply upon abandonment. See Crane v. United States, 331 U.S. 1, 14 n. 37 (1947).

can distribute any proceeds from an increase in the amount of the mortgage as a return of capital or capital gain.[237]

From the purchaser's viewpoint, there are only a few problems unique to urban redevelopment. The deed restrictions and other covenants relating to the property must be carefully checked, and if the LPA has been reasonable and the redeveloper's counsel careful, these should not be burdensome. The purchaser must also check carefully what unusual responsibilities he must assume for maintenance of public improvements and utilities by reason of formal cooperation agreements. He should also verify the extent to which real estate tax abatements and any other special advantages enjoyed by the initial redeveloper are transferable.

The purchaser may wish to preserve the FHA mortgage note because of a favorable interest rate, even though the FHA controls will remain in effect. He can do this by buying the stock of the mortgagor corporation, which will require notice to, but not the consent of, the FHA. This purchase of the stock will also preserve the right to take rapid depreciation; but there will be no "step-up" in basis by the amount by which the increased purchase price exceeds the corporation's basis, and the earlier years of heaviest depreciation will have been enjoyed by the seller. A "stepped-up" basis can be obtained if the purchaser organizes as vendee a new FHA-approved mortgage corporation to acquire the property. The transfer from the old FHA-approved mortgagor to the new FHA mortgagor must be requested by the mortgagee, and the mortgagee may not do so if the interest rate it is receiving is below current rates—it would prefer to have the mortgage paid off. In a few instances, the FHA has approved transfer to a general business corporation (with other assets) and permitted such corporations to take the property subject to, without personally assuming, the mortgage. The FHA controls have been imposed by a regulatory agreement. This procedure permits the purchaser to file a single tax return for all of its operations, including the FHA project, without the need for a consolidated tax return.[238]

XI

CONCLUSION

The importance to the United States of its urban renewal program cannot be overemphasized. Almost every American metropolitan center has a rotten doughnut of deteriorating buildings that separates its commercial downtown core from its residential suburbs. This deterioration, if permitted to spread, can undermine our urban way of life by driving to suburbia the types of city dwellers who largely

[237] See Andrews, *Out of Its Earnings and Profits: Some Reflections on the Taxation of Dividends*, 69 HARV. L. REV. 1403 (1956); Marx v. Bragalini, 6 N.Y.2d 322, 189 N.Y.S.2d 846 (Ct. App. 1959) (same treatment under New York Personal Income Tax Law). The redeveloper should check the applicability of INT. REV. CODE OF 1954 § 312(j), which taxes the distribution of proceeds of loans insured by the United States. In most instances, § 312(j) will not create a tax problem, since, for its purposes, the adjusted basis is determined without deducting depreciation. Also, see Lurke, *The Messrs. Gross and Morton: Modern '49ers*, 33 TAXES 666 (1955); Alexander, *Some Earnings and Profits Aspects of the Internal Revenue Code of 1954*, 7 HASTINGS L.J. 285 (1956).

[238] See *supra* p. 158 for a discussion of consolidated tax returns.

produce and support our cultural institutions. It has been well said that "when civilizations die, the decaying city sings the requiem."[239]

Thus far, the renewal program has been a success in its purely governmental function of demolishing the decay. Almost the only criticisms of the bulldozers have been that they occasionally chew up, along with eyesores and areas, landmarks that it would have been better to have rehabilitated than to have destroyed. But in its construction aspects, where Congress has dictated that the primary job be done by private enterprise aided by various types of governmental assistance,[240] the urban renewal progam in many instances has been severely cricticized. In some cities, cleared areas have lain idle for years as successive sponsors have become discouraged and abandoned projects because of delays, red tape, and lack of coordination between government agencies. Elsewhere, perhaps because some city has been obliged to accept any sponsor who would build anything, new projects have been built that are improvements over the demolished structures only in sanitation.[241]

On the other hand, a number of financially sound, handsome, and delightful projects have been built, in some instances even more rapidly than most non-government-aided developments, and these instances demonstrate that the urban redevelopment experiment of mixing public and private initiative can be made to succeed. Of course, there will be a recurrent need to calibrate the government aids so that they provide adequate but not excessive incentive to private enterprise; and the government program aimed at stimulating private enterprise will remain complex—necessarily, since local, state,[242] and federal governments are all involved.

In addition to these interesting problems of federalism, counsel for the private redeveloper in his work will encounter the niceties of ancient real estate law, the higher mathematics of real estate finance, the refinements of federal income taxation, and all the controversial and partially explored issues of contemporary land planning law.[243] Like the land lawyer of the eighteenth century, the railroad lawyer of the nineteenth century, and the government lawyer of the 1930's, counsel for the private redeveloper, when he looks beyond his immediate problems, will see in perspective that his function is to help develop a legal foundation for basic social and economic

[239] Lange, *Where Civilizations are Bought and Sold*, 19 PUB. ADMIN. REV. 198 (1959).

[240] National Housing Act of 1949, 63 Stat. 413, 42 U.S.C. § 1450(a)(11) (1958), requires "the urban renewal plan will afford maximum opportunity consistent with the sound needs of the locality as a whole, for the rehabilitation or redevelopment of the urban area by private enterprise."

[241] See Whyte, *Are Cities Un-American?* in EDITORS OF FORTUNE, THE EXPLODING METROPOLIS 23, 25 (1958); Jacobs, *Downtown is for People*, in *id.* at 157, 173; Editorial, *What is a City*, Architectural Forum, July 1958, p. 63.

[242] There has been relatively little participation in urban redevelopment at the state level. Much of the demand for state participation has been by those who would kill the program by assigning its implementation to the level of government not equipped (largely because of rural domination) to carry it out. See *Hearings before the Subcommittee on Housing of the House Committee on Banking and Currency*, 85th Cong. 2d Sess. 3, 9 (1958).

[243] The lawyer is not the only professional who finds his task in redevelopment a complex one. "Architects and planners realize that under existing conditions reconstructing a city is like trying to perform a major operation without being able to anaesthetise the patient." Minogue, *Rebuilding Britain's Cities*, Manchester Guardian Weekly, June 23, 1960, p. 15.

movements that are central and vital to his time. Herein lies the great challenge to him. Can the lawyer's knowledge and the lawyer's skills of analysis, judgment, coordination, and improvisation help blend public goals and private energy into a force capable in the mixed economy of the United States of reshaping the central cities into places where people who could move elsewhere will want to live?

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